IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOTT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Petitioner,

—v.—

PEDRO PERALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX TO APPENDIX

*The pages of the transcripts of the two hearings carry two sets of numbers in the original—one set reflecting the internal pagination of the transcripts and one set reflecting the pagination of the transcripts within the entire administrative record. Those portions of the transcripts which are reproduced in this Appendix contain a bracketed reference to the latter set of numbers.

RELEVANT DOCKET ENTRIES

No. 67-77-SA in the United States District Court for the Western District of Texas

Date	Filings—Proceedings
1967	
August 17	Complaint to Set Aside Decision Under Social Security Act, filed
October 11	Answer, filed
October 11	Transcript of Record of Proceedings, filed
December 21	Defendant's Motion for Summary Judgment, filed
1968	
January 15	Plaintiff's Motion for Summary Judgment and Answer to Defendant's Motion for Summary Judgment, filed
February 13	Hearing on Motions for Summary Judgment—Court ordered case be sent back to a hearing examiner for another hearing and decision—Motions for Summary Judgment denied —decision of Sec. HEW reversed
February 13	Order of Court Remanding Case, filed
March 13	Transcript of Hearing on Motions for Summary Judgment 2-13-68, filed
April 8	Notice of Appeal to the Court of Appeals for the Fifth Circuit, filed
August 13	Memorandum Opinion of Court, filed

No. 26238 in the United States Court of Appeals for the Fifth Circuit

Date	Filings—Proceedings
1968	
August 12	Appellee's Motion to Dismiss Appeal filed
August 26	Appellant's Opposition to Motion to Dismiss Appeal filed
August 27	Appellee's Reply filed
September 16	Order of Court that Motion to Dismiss Be Carried with the Case filed
1969	
May 1	Opinion of the Court of Appeals
May 1	Judgment of the Court of Appeals
October 10	Opinion of the Court of Appeals Denying Rehearing
October 22	Judgment of the Court of Appeals Issued as Mandate

No. 1302 in the United States Supreme Court

1969	
December 30	Order extending time to file petition for a writ of certiorari to March 9, 1970
1970	
March 9	Petition filed
April 6	Brief in Opposition filed
April 20	Order of Supreme Court granting certiorari

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 67-77-SA

PEDRO PERALES

vs.

JOHN W. GARDNER, Secretary of
Health, Education and Welfare

COMPLAINT TO SET ASIDE DECISION
UNDER SOCIAL SECURITY ACT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiff, PEDRO PERALES, and respectfully represents to the Court as follows:

I.

Jurisdiction of this Court is sought under the provisions of Title 42, Section 405(g), United States Code, (42 U.S.C.A. Sec. 405(g)) and constitutes an appeal from the decision of the Referee of the United States Department of Health, Education and Welfare, Social Security Administration, holding that Plaintiff is not totally and permanently disabled within the provisions of the Social Security Act.

II.

This action is commenced within sixty (60) days from the date Plaintiff was notified by JOHN T. ALLEN, and LUCILLE V. COVEY, Members of Appeals Council, in the case of: PEDRO PERALES, Claimant, PEDRO PERALES, Wage Earner, Social Security Account No. 465-38-6398, enclosing copy of Appeals Council's denial of his request for review of the Hearing Examiner's de-

cision on Plaintiff's claim for a period of disability; said notice being dated July 20, 1967, in which Plaintiff was informed that his review of the Hearing Examiner's decision was denied and stands as the final administrative decision on his claim.

III.

Plaintiff avers that he has exhausted all of his administrative remedies prior to the filing of this appeal.

IV.

Plaintiff's denial of request for review to the Office of Appeals Council, Department of Health. Education and Welfare, was styled: Case No. 465-38-6398, Claim for Period of Disability, Decision of Hearing Examiner, FRANK J. BULDAIN, dated May 29, 1967, in the case of PEDRO PERALES, JR., Wage Earner, Social Security Number 465-38-6398. The denial of request for review was dated July 20, 1967.

V.

This action is instituted in the District Court of the United States for the Judicial District in which the Plaintiff resides. That Plaintiff resides at: 618 Avenue "A", San Antonio, Texas.

VI.

The findings of fact of the administrator was not supported by substantial evidence.

The findings of fact by said administrator were contrary to law.

The conclusions of the administrator were contrary to the facts.

VII.

That Plaintiff is totally and permanently disabled as a result of:

Back condition.

WHEREFORE, the Plaintiff prays that the Federal Security Administrator, Defendant herein, may be required to answer this complaint and to file a certified copy of the transcript of the record including the evidence upon which the said findings and decision are based, and that the said decision of the Appeals Council may be reviewed, reversed and set aside and the claims of the Plaintiff for primary insurance benefits be allowed and the Bureau of Old-Age and Survivors Insurance and the Federal Security Administrator ordered to make payment of the claim of the Plaintiff and that the Plaintiff may have such other and further relief in the premises as to the Court appear just and proper.

TINSMAN & CUNNINGHAM
1907 National Bank of
Commerce Bldg.
San Antonio, Texas 78205

By /s/ Richard Tinsman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

[Title Omitted in Printing]

ANSWER

Now comes the defendant, acting by and through the United States Attorney for the Western District of Texas, and by way of answer to plaintiff's complaint would show the Court as follows:

I.

The defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

The defendant admits the allegations contained in paragraph II of plaintiff's complaint.

III.

The defendant admits the allegations contained in paragraph III of plaintiff's complaint.

IV.

The defendant admits the allegations contained in paragraph IV of plaintiff's complaint, except to state that the decision of the hearing examiner was rendered on May 12, 1967.

V.

The defendant admits the allegations contained in paragraph V of the plaintiff's complaint.

VI.

The defendant denies the allegations contained in paragraph VI of plaintiff's complaint.

VII.

The defendant denies the allegations contained in paragraph VII of plaintiff's complaint.

VIII.

The defendant further states that the findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive.

In accordance with the provisions of Section 205(g) of the Social Security Act, as amended (42 U. S. C. 405(g)), defendant files herein as part of this answer a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with Section 205(g) of the Social Security Act, as amended (42 U. S. C. 405(g)) affirming the decision complained of.

ERNEST MORGAN
United States Attorney

By: /s/ Andrew L. Jefferson, Jr.
Assistant U. S. Attorney
Post Office Box 1701
San Antonio, Texas 78206

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

[Title Omitted in Printing]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now John W. Gardner, Secretary of Health, Education and Welfare, defendant herein, acting by and through the United States Attorney for the Western District of Texas, and moves this Honorable Court under Rule 56, Federal Rules Of Civil Procedure, to enter Summary Judgment in favor of the defendant herein on the grounds that the pleadings and the attached Brief show that the defendant is entitled to Summary Judgment as a matter of law.

ERNEST MORGAN
United States Attorney

By: /s/ Ted Butler
Assistant U. S. Attorney
Post Office Box 1701
San Antonio, Texas 78206

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

[Title Omitted in Printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ANSWER TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PEDRO PERALES, Plaintiff herein, and moves this Honorable Court under Rule 56, Federal Rules of Civil Procedure, to enter Summary Judgment in favor of the Plaintiff and to deny Defendant's Motion for Summary Judgment on the grounds that the Secretary of Health, Education and Welfare's decision was not supported by substantial evidence when it failed to evaluate new medical evidence of disability submitted by the Claimant to the Appeals Council subsequent to the Hearing Examiner's decision; on the grounds that the Hearing Examiner committed error in applying the wrong legal standards to the facts in this case as to the burden of proof; on the grounds that the Hearing Examiner committed error in applying the wrong legal standards as to type of evidence required to show disability, and if they were supplied, that they were not supported by substantial evidence; and in view of the evidence in this case overwhelmingly showing that Plaintiff is disabled within the meaning of the Act and the Secretary's decision to the contrary is not supported by substantial evidence, accordingly Plaintiff moves that his Motion for Summary Judgment be granted and Defendant's Motion for Summary Judgment be denied, and that this case be remanded to the Secretary with directions that the Plaintiff be granted a period of disability and disability insurance, and the Plaintiff's attorneys be awarded attorney's fees commensurate with the time they have put into

this case in the Federal Court plus the time they have put into this case before the Secretary.

ANTHONY J. FERRO
812 San Antonio Savings
Building
San Antonio, Texas 78205

TINSMAN & CUNNINGHAM
1907 National Bank of
Commerce Bldg.
San Antonio, Texas 78205

By /s/ Michael B. Hunter
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

[Title Omitted in Printing]

MOTIONS FOR SUMMARY JUDGMENT, 2-13-68

APPEARANCES:

MR. MICHAEL HUNTER,
National Bank of Commerce Bldg.,
San Antonio, Texas,
Appearing for the Plaintiff;

MR. WARREN WEIR,
United States Attorneys Office,
San Antonio, Texas,
Appearing for the Defendant.

BE IT REMEMBERED that, heretofore, to-wit: on the 13th day of February, 1968, there came on for hearing the above styled and numbered cause before The Honorable Adrian A. Spears, Chief Judge, United States District Court, Western District of Texas, at which time the following proceedings were had:

THE COURT: Good morning, gentlemen. I will call civil number 67-77-SA, Pedro Perales, plaintiff, vs. John M. Gardner, Secretary of Health, Education, and Welfare.

I can say to you gentlemen that I have read the briefs and also read the record in the case. I would like to hear from the Government counsel first on the basic proposi-
[fol. 2] tion of whether or not this man got a fair hearing, not on any question of substantial evidence or lack of it, but just on the basic, threshhold question as to whether or not fundamental fair play was accorded, and I think, in that connection, you might give me your reaction to the position that this court has taken several times, now, in these cases, particularly where some so-called medical advisor is brought in and the hearing examiner obviously defers to the medical examiner or

the medical advisor, and it is perfectly obvious in this case that his findings parroted almost word for word the conclusions reached by this medical advisor, who admittedly did not examine the plaintiff, had never seen him professionally or at all before he went to the hearing, and the reaction that I get from that sort of thing is nausea, because, in the first place, I think that hearsay evidence in the nature of ex parte statements of doctors on the critical issue of a man's present physical condition is just a violation of the concept with which I am familiar and which bears upon the issue of fundamental fair play in a hearing.

Then, when you pyramid hearsay from a so-called medical advisor, who, himself, has never examined the man who claims benefits, then you just compound it—compound a situation that I simply cannot tolerate in my own mind, and I can't see why a hearing examiner wants to abrogate his duty and his responsibility and [fol. 3] turn it over to some medical advisor.

As I have said from the bench before in these cases, I can listen to a doctor testify, and I think that I am capable, after he has been fully examined, to determine whether or not in my own mind I can give any weight or great weight to this testimony. I think a jury can do it and they do do it every day, but I think the person to interpret is the doctor who made the examination, who made the report, and not some stranger from Houston to come over and interpret what the San Antonio doctors have to say.

Now, I think that if a doctor is going to testify, his testimony is going to be relied upon by either side, and if both sides don't agree that his ex parte statement may be received in evidence, then I think the duty devolves upon which ever side wants him to get him there and let him be subjected to cross examination, which, to me, is the greatest single thing in the adversary procedure.

I have seen people on direct examination give testimony that was unimpeachable, only to be shown up on cross-examination as a virtual fraud. I am not suggesting that any of these doctors are frauds. I know they are not. I know all of the doctors are fine men and certainly are

respected in their profession, but I don't think—I think a doctor would be the last one to contend that his science is a certain one. Medical science is not definite and certain.

[fol. 4] I am sure that this doctor who came over from Houston is a very capable man and, no doubt, if he were testifying in any court, considering his background, I would give his views considerable credence, but I would certainly want to have him examine the man. I would not object to him considering what other doctors have said. I would not object to him reading medical reports from other doctors, but I would want to test his knowledge on the basis, not of the medical reports he had read, but of his own examination, his own conclusions which are arrived at after he had made his own independent judgment as to what had taken place.

Now, this concept is not new. This is not something that I am imposing upon the Secretary of Health, Education and Welfare. This has been a part of our system and a part of our jurisprudence for many, many years.

It happens in many of these cases that informalities are observed to the point where a lot of extraneous matter comes in without objection. Maybe both sides are perfectly willing to do it. I know I never represented a client that way. I had many of them before administrative agencies. I never let everything plus the kitchen sink come in unless it came in over my objection.

I noticed in this record that Mr. Tinsman, who represented this man, objected from the very beginning. He objected and he told the hearing examiner that it was [fol. 5] this Court's attitude—and he used the name of the court—that objections should be made. I think—although I can't assume this, but it seems to me apparent from reading the record—that the hearing examiner was perfectly well acquainted with this Court's attitude. The reason I think he must have been is not only because Mr. Tinsman in effect told him, but also because, On December 14, 1966, which was about a month before this hearing was conducted, in January, 1967, and certainly a considerable time before the supplemental hearing was conducted on March 31, 1967, this Court had entered an

order in Civil Number 3356 styled Joseph C. Grant vs the Secretary of Health, Education, and Welfare, where the matter was remanded to the Secretary for further hearing because of the fact that a doctor Oates, who had never examined the plaintiff in that case, was permitted to interpret what other doctors had said in their written reports.

Now, gentlemen, as I say, this is all so completely contrary to every concept that this Court has of a fair hearing that I can't possibly let a situation like this stand without sending it back for a review or a new hearing. I think the substantial evidence rule is a vicious thing anyway. I am not prepared to say that it should not be a part of our system; I have my doubts about it, but whether I like it or not I have to recognize that it's the law and I am prepared to follow it, even though I [fol. 6] may have reservations about it, and I feel that it has the effect in many instances—well, in every instance—of depriving an individual to a right to trial by jury and all the other things that we recognize as safeguards in our system, but before I am going to apply the substantial evidence rule to a case, I want to be sure that the initial hearing has been conducted in an atmosphere of fairness to the point where I can say to myself, in reviewing the matter, "Well, there is no question about the fact that the petitioner or the plaintiff received a fair hearing and the examiner arrived at this conclusion and there is this evidence in the record to substantiate his conclusion, even though I may not agree with his conclusion." I think that if he arrives at the conclusion after he has conducted a fair hearing, then the court is bound by his conclusion if it is reasonably supported by substantial evidence and the Court cannot substitute its judgment for that of the hearing examiner.

I recognize those basic provisions of our law; as I say, whether I agree with it or not, I just have to follow them, but I get back to the initial proposition: I think a hearing which produces this substantial evidence should be—even though informal—I am not suggesting that the Secretary or his hearing examiners should conduct formal trials, but I think even with the informality there are

certain basic concepts of fundamental fair play that have [fol. 7] to be observed, otherwise our Government can very easily fall into the pattern of government by men rather than government by law, and I don't think that a hearing examiner ought to abrogate his authority and his power.

It is not the duty of some medical advisor to come in and interpret for him. He ought to be intelligent enough to decide for himself after he has received the right kind of interpretations from the people who made the reports, and I have tried to make that clear that this is not unreasonable to expect them to do that.

Now, if he wants to call in medical advisors, he can do it, but I think before this medical advisor should open his mouth he should examine the man and arrive at his own conclusion about what the condition of the man is, and if the hearing examiner feels that this man is, that his testimony is entitled to more credence than other doctors in the case, I don't know what the court can do about it, or that the court would be inclined to do anything about it.

I tell you, I think if the hearing examiner is going to have a medical advisor, the Government can just save money and just send the medical advisor and leave the examiner at home. Then they don't have to pay but one of them to make a decision, but you can look at the testimony of Dr. Leavitt and look at the findings made by the hearing examiner and it is perfectly obvious that the [fol. 8] man who made the findings in the case was Dr. Leavitt.

All the hearing examiner did was sign his name to it—I mean, as far as the man's physical condition was concerned.

Now, in this case, Dr. Morales, who was the plaintiff's personal physician, is the only doctor who testified. Mr. Tinsman objected to the ex parte statements from other doctors in the case, some of whom gave opinions and reports adverse to the plaintiff's interest. The hearing examiner indicated in one portion of the transcript, in the early portion, that he was not going to—that some of these things really were not of any consequence, had

no significance, but that is not the way he ended up, because he ended up giving great significance—in fact, almost exclusive significance—to the hearsay testimony of Dr. Leavitt, which was, as I say, compounded hearsay because it was hearsay on hearsay. I don't know where that could end. We'd probably have somebody coming in and interpreting by hearsay what Dr. Leavitt testified to on the basis of the ex parte reports he had read, and maybe somebody else coming in and testifying what he thinks about the testimony of the doctor who interpreted Dr. Leavitt's testimony on the basis of ex parte statements made by the doctor. Where would it end? So it is not my desire to keep sending these cases back to the Secretary, and it may be that the plaintiff is not entitled to anything—I don't know—but I am just not prepared to take the record of this kind and apply the substantial [fol. 9] evidence rule to it, because I just don't think that Dr. Leavitt's testimony is substantial in any sense of the word. I don't think the ex parte statements of doctors which are objected to properly, timely, constitute substantial evidence in any sense of the word, and, as I say, I am not the only one that holds this view. This view is supported by court of appeals' opinions and by other district courts all over the country.

If the practice in the past has been to do this, I think it is time for them to sit back and take another look because right is right, and I think that hearings ought to be conducted properly.

A person who has a claim for benefits under the social security act has just as valid a situation as anyone else who claims rights under law, and while I would not want to suggest, as I have said, and I repeat, I don't want to suggest that the Secretary or his examiners must conduct hearings in court before juries, I do think that they ought to observe what I have referred to as the fundamental rules of fair play.

Now, this is the second one that you have had before me, Mr. Weir, lately, were I have felt, upon reading the record, that an argument on substantial evidence is just not applicable yet. I realize I haven't heard from you this morning, but I think you know and understand the

position that I have taken in at least the prior case which [fol. 10] you were in here on. Do you have any comments you want to make? I know it might be anticlimactic for you to make them, but—I don't want to even try to put you on the spot as to whether you think this was the type of hearing that would satisfy your basic concept of fair play, but if you have any statements, I'd be happy to hear from you.

MR. WEIR: Well, I would say, first of all, your Honor, that as directed during the motion for summary judgment hearing on the Riley Case, I have informed the Social Security Authorities, relevant authorities, as much as possible, which I think was reflected in your order on that case, your attitude under these circumstances.

There are two or three points I would like to advocate with regard to the problem of fairness in this case. I think the first point relates to the strength of the evidence that we are talking about in this hearing. Dr. Leavitt was a doctor who was rather well educated, rather well experienced—

THE COURT: I don't think there is any doubt about that.

MR. WEIR: I feel that his testimony would be much more valuable than my testimony or a medical student's testimony regarding his view of some reports, entitled to a little more strength in this case or in any other case.

I also understand that more and more doctors consider the history of a case and what other doctors have thought [fol. 11] about it as very important. I think that was brought out in this case.

After Dr. Morales testified regarding his feeling about Mr. Perales' condition and about his failure to really put his finger on something—at one point he did begin to suggest that perhaps there was objective evidence available, that he himself had to go to the reports, the hearsay reports of some of the other doctors which are in the record—

THE COURT: I think that is all right. I think that is permissible, but he was a man who had examined the plaintiff and who was in a position to, shall I say, co-

ordinate the information that he received, or to reconcile, is the word I want to use, to reconcile the information he received from other doctors to see whether or not it was in conformity with his own conclusions and if it supported his conclusions. I think you can see there, if you have an objection, the objection would go to the weight rather than the admissibility.

You know, under our local court rules we provide for the appointment of an impartial medical expert, and I think that has a salutary effect. I think it is good. Of course, if I hadn't thought so I wouldn't have wanted it in our rules, but, basically, the impartial medical expert must still conduct his own examination and then he can testify. But go ahead and develop your point.

MR. WEIR: I wondered to myself on this record—I [fol. 12] can't say that I am convinced that it is true—if Dr. Morales were here today and the last question had been asked to him in this record: "Doctor, do you think that an examination today would change your mind, would give you more evidence," I suggest that with his emphasis upon his past dealings with the patient, upon the past dealings of other doctors with this patient, that what doctor Morales felt was most important in this case was not how the plaintiff would appear today under physical examination but how he had appeared in the past to a number of doctors. It seems to me that the evidence of an expert, be it Dr. Morales or Dr. Leavitt, when they have had a lot of experience and when they, themselves, contend that the medical history, whether observed by them or others, might well be the most important factor in the case, that this evidence is fairly strong evidence, your HOnor.

THE COURT: Well, Mr. Weir, I agree that doctors are becoming more and more conscious of past history as a very important element in making any diagnosis. No doubt about that. I think the Courts recognize that, but no matter how important past history may be, they still make their own examination to see whether or not their own personal observation is in accord or in conflict with what their past history may be. In other words, I think for a doctor to form a meaningful opinion, he

[fol. 13] has to have the whole and not just a part, and it seems to me that while the past history, as reflected in reports of other doctors, may be important, I don't discount that it is equally important that the doctor have his own examination so that he can come to his own conclusion and make his own conclusions as to what he has learned, not only from what other doctors have said but on the basis of his own examination.

As I say, medicine is not an exact science; they recognize that it isn't, but when you have a doctor who testifies as an expert and if you were sitting on that jury over there and a doctor took this stand and began to testify on the basis of ex parte statements made by other doctors—in the first place, he wouldn't be able to do it because he wouldn't get to first base in my court, but let's assume that the judge was asleep and the doctor began to testify and you were sitting on that jury and on cross-examination it developed that this doctor had not been seeing the man before. I'll ask you a rhetorical question and I'll answer it myself: How much weight would you give to that doctor's testimony? My answer would be: very little, if any.

The only thing I say is that in order for an expert to act as an expert, he ought to interpret what other doctors have said in the light of his own experience. That is the charge the jury is given when they are called upon to make the decision. The courts say: you view this [fol. 14] evidence and make your decision in the light of your own experience.

Now, if the doctor who is an expert is going to make an interpretation or render a decision in the light of his own experience, as a part of that experience, in order to qualify him as an expert, he has to know something about the subject matter, and in order to do that, it seems to me that it is basic that he has got to examine this man.

If the doctor should take the stand and say: "Well, I don't know exactly what doctor so and so meant by this expression he used; I can tell you what I think he means, but I don't know what he means. I didn't make the examination. I just have to accept this on the basis of

what I think the doctor meant," I don't think that would be very helpful.

On the other hand, if you put the examining doctor on the stand and he testifies and counsel asks him on cross-examination: "Doctor, now, you have said so and so, what did you mean by that?", then this doctor states what he meant in lay language by this, then it is easy for you, for the judge, and for the jury to know what the doctor meant, but to have somebody else come and testify that he thinks—and that is all he can do, because he doesn't know—this is what the doctor meant, or on the basis of what the doctor said, his interpretation of what he meant, he would come to this conclusion, I would say it has absolutely no probative value at all. It may be interesting to hear the doctor testify.

[fol. 15] This theme runs through all the cases involving these matters before the Secretary of Health, Education and Welfare involving social security benefits, that the critical issue is the present physical condition of the claimant and since it is so critical and since his rights are going to be adjudicated on the basis of medical testimony, because the law also contemplates this, he must have a fair hearing.

Now, if we are going to do that, then it just occurs to me—and I am not going to say this officially—but it just ought not to be necessary for an examiner to bring a doctor from Houston here, all the way from Houston, Texas, to San Antonio, Texas, to interpret what the doctors in San Antonio say. I say all those doctors in San Antonio could be brought over here to this building probably at less expense to the Government than bringing one doctor all the way from Houston over here, but even if they couldn't be, they ought not to be niggardly in providing a fair hearing, and a fair hearing seems to me to contemplate that there be probative evidence from the physicians involved.

I have seen situations like this where a party may agree that a doctor's statement can come in because he reads the statement and the doctor doesn't say anything to hurt him or maybe he doesn't say anything to help him, just sort of a nebulous thing; on the other hand,

you find situations where a party—I am talking about [fol. 16] a claimant who wants the doctor's statement in because it is very favorable to him. I think the saw cuts both ways. I think the hearing examiner ought to say to the claimaint: "Well, I can't accept this statement from the doctor ex parte, because I think the doctor ought to be here to express himself and to be subjected to cross-examination technique."

The examiner talks very glibly to the claimant and says: "Now, don't worry about me asking questions and sounding like I am not favorable to you. Don't think that if I ask a question favorable to you that that represents my thinking, because it doesn't." But you have the examiner acting as a judge. He says he is not a judge, but any time you make a decision in an adversary proceeding, you are a judge. You can be a hearing examiner or you can be a Corporation Court judge or you can be a member of a commission in a condemnation case. When ever you have the decision and the power, as I see it you are the judge. So he is the judge. He also at once becomes an advocate because he has to interrogate, and conceivably he could also be a prosecutor and the one who is adverse and acting adverse to the plaintiff.

I am sure that these hearing examiners are dedicated men. I don't attach any improper motives to them in any way, shape or form, but I think that the fact that he is wearing these various hats puts him in a rather unfavorable position in trying to come to a conclusion [fol. 17] that is impartial. I am sure they do the very best they can under the circumstances, but when you couple with that these other matters that I am talking about, then I think you are depriving the individual who is there of his right to a fundamental fair trial. If we start out at the inception with a premise that is wrong, and then you build on it, no matter how far you go, you just keep repeating the same mistake, compounding the same error.

As I say, I don't think that is original with me at all. I don't think this represents any departure from long standing concepts, and it is just the way that I feel

that it ought to be done. Until some appellate courts tells me that I am wrong and I can't do it—I say some appellate court; I am talking about the Court of Appeals for the Fifth Circuit and the Supreme Court of the United States; those are the only two that can change it—until they do it, I am going to insist that these hearings be conducted in a proper way. As long as they don't do it—this is not a threat—I am just going to keep sending them back until they do or until somebody with a little more authority than I have tells me that I am wrong.

Do you want to say anything else?

MR. WEIR: Just about two more sentences.

THE COURT: All right.

I know you weren't there, Mr. Weir, and I know you have to take these things as you find them, and somehow [fol. 18] I feel that if you were sitting where I am, you'd be feeling exactly the same way, but you go ahead.

MR. WEIR: I share a concern for the fairness in the way the Government treats its people in administrative hearings as well as elsewhere. I also wonder what the impact of the complete exclusion of hearsay from the administrative hearing would be, who would bear the biggest burden, the brunt of that rule?

THE COURT: I haven't said the complete exclusion of hearsay. I say, that evidence on the crucial issue of a man's present physical condition ought to be handled with kid gloves; that is what I am talking about. I am not—there were some other matters there that were objected to on the grounds that they were hearsay, and I would be hard put to reverse the case or to send it back because of the omission of that kind of hearsay, because it was more or less of a historical nature and did not bear directly upon what I consider to be and what the courts apparently consider to be the real issue, but I do think, as I say, I am not speaking alone; other judges before me have said the same thing, and in the order that I entered in the Grant case, I took verbatim from one of the cases. I don't have that file with me. I just have a copy of the order. I took verbatim from one of the cases the language that I used to the effect

that ex parte statements by doctors on this critical issue [fol. 19] —I am paraphrasing now, because I don't have that before me, but that it has little or no probative value.

MR. WEIR: Does that refer to a letter from a physician which can be produced without the physician?

THE COURT: Well, I think it would be beyond any question unless the physician is there to support his letter or unless the other sides doesn't object.

I happened to be reading not long ago a case tried before the Civil Service Commission, Fire and Police Civil Service Commission, the City of San Antonio, and in this letter was—not the Firemen and Police Civil Service Commission; it was the Fire and Police Pension Board, and on the very critical issue of the man's physical condition, the attorney representing him let ex parte letters from doctors go in without objection, and the trial court here in San Antonio reversed it; the Court of Civil Appeals reversed the trial court and affirmed the decision of the Pension Board and I think properly so, because the doctors whose letters went into evidence just cut this man to ribbons on his physical condition, but this was a case where a man was represented by counsel and counsel let the letters go in evidence and then the Pension Board took those letters and beat him over the head with them, and in a situation like that, I would have to say that the Court of Civil Appeals was correct, and the Supreme Court refused writ of error; I [fol. 20] am talking about the Supreme Court of Texas. But here we don't have that situation. We have here the attorney representing the claimant telling the examiner at the very beginning: "Now, we are going to object to any hearsay on this issue." He objected to all hearsay, but among his objections he stated that he was objecting to the ex parte statements of the doctors, and he said: "I am going to object to the testimony of Dr. Leavitt," and it is apparent that he hasn't examined the plaintiff and whatever he testified to was hearsay and unless you asked him a hypothetical question—if you ask him a hypothetical question to assume certain things to be true,

you can run him on the stand all day long. You see what I am talking about?

MR. WEIR: Yes, sir.

THE COURT: If we asked Dr. Leavitt to assume such and such to be true, "What would your conclusion be"—but he would have to assume matters that had been proved and he could not assume a matter that was an ex parte statement because they would not have been proved. If Dr. Leavitt were put on the stand after other doctors had testified to such and such, even though he had never seen the man, and they said to him: "Doctor, assuming this and assuming that, and assuming that this man can do this and assuming he can't do this, and all of these things, what would your opinion—do you have an opinion as to whether or not he is physically dis- [fol. 21] abled," and then the doctor said "Yes," he would be permitted to express an opinion. Then the trier of the facts could give his opinion as much weight as the trier of facts thought he was entitled to receive, but that wasn't done. The attorney representing the claimant objected:

"Unless the doctor examines the patient or unless you ask him hypothetical questions, I am going to object," and when the examiner said: "Well, your objection is noted but it is overruled." Then Mr. Tinsman said: "Well, I want the record to show that I have a running objection to all of the statements." So I think the record is clear on the point.

MR. WEIR: It is my understanding that the hearing is so geared that it is possible for a plaintiff, without representation by attorney, without a doctor appearing on his behalf, may bring in a letter from a doctor and obtain the benefit of this, which he is entitled to. Apparently there was some purpose to setting the hearing up so they could do it that way.

THE COURT: I don't think there is any question about that. I think the overwhelming majority of these cases are disposed of in that very simple way. I am not so sure that every claimant's rights are properly protected. The only cases that I have to review are those where they either had a lawyer at the hearing or they

got one after they got an adverse decision. So what [fol. 22] happens in the run of the mill case where a claimant doesn't have a lawyer? I don't know. I would hope that the examiners would give them the benefit of any information that they might submit, but on the other hand, let's say that a claimant comes in one of those hearings. He is ignorant, doesn't know. We give a man a lawyer in a criminal case and we say that no matter what sort of crime he is charged with, he is entitled to legal counsel, but if they go to have other rights adjudicated, they don't have lawyers, and if a fellow comes up with a letter from a doctor—let's say the examiner brings in this medical advisor who is going to make his decision for him. The medical advisor takes this letter and maybe takes other letters and comes to the conclusion and tells the examiner what his conclusion is and the examiner, as was done in this case, just copies it down almost verbatim and says: "These are my findings of fact." I wouldn't be able to say that justice was done. It may have been done, but the up shot is I don't have psychic powers. I am not a soothsayer. I just don't know. Just like in this case, maybe Dr. Leavitt would have an entirely different concept if he had examined this man, and say: "I'll tell you what they said, but I just don't agree with them." But he is put in a position of accepting as gospel whatever some other doctor says and placing his interpretation upon what that doctor meant and then expressing it and then having the examiner make his findings almost verbatim, in the same [fol. 23] language. That, to me, is wrong.

MR. WEIR: In this case if Mr. Perales had gone to Dr. Morales and Dr. Morales said: "I don't have time to testify on your behalf, but I'll give you a letter detailing your condition of which I have personal knowledge for as long a period of time as you want it," would it be appropriate for the hearing examiner to have accepted that at the first hearing on this case and to have ruled for the plaintiff on the basis of that letter?

THE COURT: Well, I think that would be a determination that the hearing examiner would have to make, but I would say this: that any lawyer who is represent-

ing Mr. Perales who undertook to rely upon a letter from the doctor would, in my opinion, not be representing his client well. I think that in order for him to—particularly if he has reason to believe that there would be other testimony given or other letters that would be adverse —because I think that the only way that a doctor's— Listen, Mr. Weir. I have seen it happen too many times. I have been at this business for 33 years, going on 34, and I have heard lots of doctors testify and I have heard their testimony when they have a letter that they had written before them, and what it amounts to afterwards —I am going to tell you: often times, and not just seldom, but often times you can't tell. Well, you know that the statements made in the letter were probably hurriedly [fol. 24] made or improvidently made, not based upon proper reflection or without having taken other aspects of the case into consideration at the time, and I mean that is a human element that we have to contend with, and I don't think I can say in good conscience that I have ever seen a doctor who I thought deliberately lied. In fact, in the time I have been practicing law and been on the bench I would have to stop and think of a medical witness I think deliberately lied. I think some of them have colored their imaginations a little bit from time to time, and I think a doctor who examines a patient like Mr. Perales, has known him for a long period of time, is bound to be sympathetic with him; that is just human nature, and I think those things have to be taken into consideration by the triers of the facts. He has to know what the situation is. I think a doctor who wasn't interested in a patient would be inclined to become his advocate in a sense; that is no reflection on the doctor, but by the same token I think the doctor brought here from Houston, Texas, at the behest of the examiner who is handling the case for the Social Security Administration might be inclined subconsciously or otherwise to testify a little harshly and in favor of the side that employed him.

Those are just comments that I think I have made without any rancor or without any bitterness or without any suggestion that this is done deliberately, that those

are things that are developed on cross-examination in a [fol. 25] well-regulated trial which the trier of facts can take into consideration.

As long as you practice law you are going to be trying to show what the bias and prejudice of a witness is, what his interest is. You are going to argue that to a jury.

The reason I am spending so much time talking about this is that I would hope that you or someone else with the United States Attorney's Office or representing the Government would be able to get across to the hearing examiner or to the Secretary of Health, Education, and Welfare that there is a happy medium that should be reached there some where and that doctors' statements, as fine as doctors are, they are just not gospel and they are subject to all of the human frailties that all of the rest of us are subject. The mere fact that they have a degree doesn't put a halo around their heads, and they can make mistakes, and that this right to cross-examination—The longer I am in the law business, the more important I see how it is or that it is.

Here is a man who, all during the hearing, asked: "Give me the right to cross examine. Let me look at these doctors eyeball to eyeball. These doctors that have made these reports and have sloughed it off and said 'There is nothing to it', let me look them squarely in the eye." This doctor who said that Mr. Perales was recalcitrant, that he was a reluctant patient, that he had never [fol. 26] seen a patient who was more reluctant to be examined or more reluctant to cooperate may well be tested by the skill of the cross examiner who might be left with the same conclusion, but I think with testimony of that kind it is going to go into the record and that somebody representing this man ought to have the right to ask this doctor some questions about his conclusion. To me that was a very prejudicial statement made by the doctor, and if this doctor testified and I heard him and I were convinced after he testified and after he had been thoroughly cross examined that his conclusion was justified, I might take a dim view of Mr. Perales and his claim, too. That goes into the record absolutely unchallenged.

Well, do you have anything you want to say?

MR. HUNTER: No, sir.

THE COURT: You guess from what the judge said it looked like the best thing to do was to keep quiet?

Gentlemen, I am going to send this back to the Secretary. I am going to ask that a new hearing examiner be supplied. I am going to provide that a new hearing be conducted and that the medical—that he be given a current medical examination and that the doctors who conduct these examinations be made available for testimony and for cross-examination. However, the order is going to provide, as others that I have entered in these cases have provided, that the parties may agree on any [fol. 27] evidence that was submitted in a prior hearing and they may agree that this can be submitted on the record. For instance, the testimony of Dr. Morales; the testimony of this vocational expert. Maybe the parties can agree that their testimony can be considered on the basis of the record as made, but I am not suggesting that they have to, or that the Secretary—the examiner is obligated to do it at all. They can just start all over or they can agree on which part will be received and which part will not. That will be up to counsel, but I think a new examiner is in order, because this examiner was told ahead of time what this court's attitude was about it. He chose not to follow it. I think we ought to get one that is going to follow the Court's order. The order that I enter in this case is going to be the law of this case until some other court says it isn't.

I have a duty to perform as well as they do. I am going to do it to the best of my ability, and if, after a hearing, they come to the same conclusion, then I will be glad to hear you gentlemen on the substantial evidence rule, but right now I just don't think we have got a hearing, got a record that we can either apply or not apply the substantial rule to. As a matter of fact, if I entered an order on the basis of this record I would reverse the Secretary and order that the benefits be given to the plaintiff, because, first, I would think the evidence [fol. 28] was not—of Dr. Leavitt—of any probative value whatever, and the only evidence from the medical

expert in this record which follows the rules that I have layed down in other cases, which this trial examiner was well aware of or should have been—the only evidence is from Dr. Morales.

If I were going to enter a judgment, I'd enter it on the basis of his evidence, which I don't think is contraverted by anything properly admitted in evidence or of anything having any provative value. I would have to use the subjective testimony of the plaintiff as to what he can do and what he can't do and I would say that his testimony is completely consisten with Dr. Morales' testimony. It would be inconsistent with some of the other statements made, but if I were to eliminate those statements, I would find for the plaintiff, but I am not interested in dealing in technicalities for either side.

I think justice is done when a full hearing in this case, when a fair hearing is held. That is all I want to see done in this case.

Thank you very much, gentlemen. I will enter a judgment. You needn't worry about preparing one.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 67-77-SA

PEDRO PERALES

v.

JOHN W. GARDNER, Secretary of Health, Education and Welfare

ORDER REMANDING CASE

On the 13th day of February 1968, came on to be considered the motions for summary judgment filed by plaintiff and defendant; and it appearing to the Court that hearings were held on January 12, 1967 and March 31, 1967, but the only medical evidence presented, other than certain ex parte statements, was the testimony of Dr. Max Morales, Jr. and Dr. Lewis A. Leavitt. Dr. Morales testified to the effect that plaintiff, in his present condition, will not be able to continue gainful employment as a common laborer. Dr. Leavitt, who had never examined the plaintiff, after having been permitted, over objection, to interpret what other doctors had said in their written reports, concluded that the plaintiff is suffering from a low back syndrome of musculo-ligamentous origin, and of mild severity. Other evidence as to the present degree of plaintiff's physical disability was supplied by the plaintiff himself. No doctor who had personally examined plaintiff, and who had submitted a report adverse to his interest, was called upon to testify in person.

(1) Except in unusual circumstances, and none are shown to exist in this case, the Court is reluctant to accept as substantial evidence, over objection, the opinion of a medical expert submitted in the form of a written report, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination.

(2) In the opinion of this Court, the Secretary of Health, Education and Welfare should recognize the invalidity of ex parte reports from doctors as evi-

dence having real probative value in a case. Such "evidence", when stacked up against the oral testimony of examining doctors could hardly constitute substantial evidence as contemplated by law.

(3) The critical issue as to plaintiff's present physical condition should be resolved only after current medical examinations have been conducted, and all of the examining doctors whose views are to be relied upon, in whole or in part, have been made available at the hearing in person, if either side so desires, in order that their opinions may be openly expressed and both parties may have an opportunity to question them all in a meaningful way. This does not mean that the examining doctors should not have access to medical records, as well as other doctors' reports, in arriving at their independent judgment concerning plaintiff's present physical condition, but it does mean that no medical evidence should be received and considered, over objection, unless it is of the nature and form indicated; provided, however, the parties may by agreement incorporate into the record for consideration the testimony given by any witness, medical or lay, at either of the two prior hearings.

(4) The testimony of Dr. Leavitt (called by the examiner as *his* medical adviser), which undertakes only to interpret what other doctors have said and draw conclusions therefrom, is of little or no probative value (even though the doctor is no doubt highly competent in his field), since it is apparent that the witness was not testifying in response to hypothetical questions, he had not personally examined the plaintiff, and he had made no independent determination as to plaintiff's present physical condition. As a consequence, he could not speak from personal knowledge. If an *interpretation* of any report was called for, the proper one to perform this function would be the doctor who submitted it. This is particularly true when it is obvious that the hearing examiner in his findings has relied heavily on

the opinion of the "medical adviser", who made it clear that he had never seen the plaintiff prior to his appearance at the hearing, and candidly stated: "All I can interpret is what the physicians who have examined the man over a period of months have stated". Since the ex parte statements "interpreted" by the medical adviser were hearsay, and the medical adviser's testimony was hearsay, his testimony amounted to pyramiding hearsay upon hearsay, which violates the fundamental rule of fair play in a "hearing".

(5) The record in this case should contain all pertinent evidence developed in a proper manner, and pursuant to the well-established rules of fairness. Inasmuch as this has not been done, this Court is of the opinion that in the interest of justice this cause should be remanded to the Secretary with instructions to assign this cause to a different hearing examiner to hear the entire matter anew. Either party should be afforded full opportunity to present competent evidence on pertinent issues, and findings should be made solely on the basis of the record made at the hearing before the new examiner, which record may, as indicated, contain, by agreement only, any testimony submitted at either of the prior hearings.

It is, accordingly, ORDERED, ADJUDGED and DECREED that the motions of plaintiff and defendant for summary judgment be and they are hereby in all things, DENIED, the decision of the Secretary of Health, Education and Welfare denying the relief sought is REVERSED, and this cause is remanded to the Secretary for a full new hearing before a different examiner, at the earliest practicable time.

Entered the 13th day of February, 1968.

/s/ Adrian A. Spears
ADRIAN A. SPEARS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 67-77-SA

PEDRO PERALES

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE

Counsel for Plaintiff:

RICHARD E. TINSMAN
Tinsman & Cunningham
1907 National Bank of Commerce Building
San Antonio, Texas 78205

ANTHONY J. FERRO
Attorney at Law
812 San Antonio Savings Building
San Antonio, Texas 78205

Counsel for Defendant:

WARREN N. WEIR
Assistant U. S. Attorney
Post Office Box 1701
San Antonio, Texas 78206

MEMORANDUM OPINION

This is an appeal brought under the provisions of 42 U.S.C.A. § 405(g), from a decision of the Appeals Council affirming the hearing examiner's holding that plaintiff is not entitled to any disability benefits under the provisions of the Social Security Act.

Hearings were held in San Antonio on January 12, 1967 and March 31, 1967. At the initial hearing the only witnesses were the plaintiff and a physician whose testimony was to the effect that plaintiff would not be able to continue gainful employment as a common laborer.

Other evidence consisted of certain unsworn medical reports received, over objection, by the hearing examiner.

At the second hearing, although no examining physicians appeared, and there was no showing that they were unavailable, the hearing examiner heard testimony, over objection, from a "medical adviser", who had never examined the plaintiff, and did not testify in response to hypothetical questions. Nevertheless, he was allowed to interpret "what the physicians who had examined the man over a period of months have stated", and the hearing examiner, in arriving at his findings, relied heavily upon that interpretation.

Except in unusual circumstances, and none are shown to exist in this case, this Court is reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination.[1] *Ratliff* v. *Celebrezze*, 338 F. 2d 978, 982 (6 Cir. 1964); *Mullen* v. *Gardner*, 256 F. Supp. 588 (E.D.N.Y. 1966).

Similarly, the opinion of a doctor who has never examined or treated a claimant, is entitled to little or no probative value, especially when it is opposed by evidence of a substantial nature, including the oral testimony of an examining physician. See *Hayes* v. *Gardner*, 376 F. 2d 517 (4 Cir. 1967).

Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicians are received as original evidence on the critical issue of plaintiff's physical condition, a non-examining medical expert is then allowed to "interpret" those *ex parte* reports, and that "interpretation" forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding hearsay upon hearsay, which, under the circumstances of this case, violates the fundamental rule of fair play and cannot be permitted to stand.

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[1] This is not to say that the *examining* doctors should not, under proper circumstances, have access to medical records, as well as other doctors' reports, in arriving at their independent judgment concerning a claimant's physical condition.

Since it appears that the hearing examiner, having been forewarned, deliberately ignored similar rulings made by this Court in an earlier case, the interests of justice will be better served by remanding this cause to the Secretary for a new hearing before a different examiner, at which hearing the interested parties will be afforded full opportunity to present competent evidence on all pertinent issues. New findings should then be made solely on the basis of the record made at the hearing before the new examiner, which record may, however, contain by agreement any evidence submitted at either of the prior hearings.

It has been SO ORDERED.

Entered this 13th day of August 1968 at San Antonio, Texas.

/s/ Adrian A. Spears
ADRIAN A. SPEARS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 26238

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

Appeal From the United States District Court for the Western District of Texas

(May 1, 1969)

Before COLEMAN and GOLDBERG, Circuit Judges, and SKELTON, Judge of the Court of Claims*

SKELTON, *Judge.*

Pedro Perales, Appellee, hereinafter called claimant, filed an application for social security benefits in April 1966, claiming that a back injury received by him on September 29, 1965, had disabled him. This application was filed with the Secretary of Health, Education and Welfare, hereinafter called "the Secretary" or "HEW," under 42 U.S.C.A., Sections 416(i)(1) and 423 of the Social Security Act. His application was disapproved, and, thereafter, he requested and was granted a hearing before an examiner. The hearing consisted of two sessions, the first of which was held in San Antonio, Texas, on January 12, 1967. The supplemental hearing was held on March 31, 1967.

At the hearings, the examiner offered and introduced into evidence, over the objection of claimant's attorney, a number of unsworn medical reports of doctors who had examined the claimant but who were not present at either hearing and did not testify. The claimant objected to this evidence on the ground it was hearsay and its

* Sitting by designation as a member of this panel.

admission deprived him of the right to be confronted by witnesses who were against him and of the right to cross-examine them. The examiner overruled the objections and received the reports into evidence.

The examiner also allowed a Dr. Lewis A. Leavitt to testify over the objection of claimant. He had been flown from Houston to San Antonio by HEW to testify as an expert in the case. He had never examined the claimant and his testimony consisted of his "interpretation" of the medical reports of the absent doctors mentioned above. The claimant objected to this testimony because it was hearsay based on hearsay and because the witness' answers were not confined to hypothetical questions. Actually, he was not asked any hypothetical questions. The examiner allowed this witness to "interpret" the reports of the absent doctors in such a way as to indicate that claimant was not disabled.

The only direct evidence from live witnesses bearing on the physical condition of the claimant was that of the claimant himself and one Dr. Max Morales, who had examined and treated him. This evidence showed that the claimant was disabled and supported his claim for the social security benefits.

After the second hearing, the examiner determined, on May 12, 1967, that the claimant was not entitled to disability benefits. The claimant requested a review by the Appeals Council on June 16, 1967, and on July 20, 1967, he was notified that the Appeals Council had approved the examiner's denial of his claim and that its affirmance of his decision constituted the final decision of the Secretary in his case.

The claimant appealed his case to the United States District Court for the Western District of Texas. After HEW filed its answer, both parties filed motions for summary judgment. The court heard the motions, and on February 13, 1968, denied both motions and reversed the decision of the Secretary denying the relief sought, and remanded the cause to the Secretary for a full new hearing before a different examiner. In addition to the order of February 13, 1968, the court filed a memorandum opinion in the case on August 13, 1968, which con-

tains basically the same recitations and orders that were included in his order of remand of February 13, 1968.

The Secretary appealed the case to this court. The claimant filed a motion here to dismiss the appeal on the ground that the judgment of the trial court was interlocutory and not appealable. We entered an order carrying this motion along with the appeal.

The three basic questions to be decided here are: (1) Was the decision of the trial court an appealable one? (2) Is hearsay evidence, when objected to, admissible in an administrative agency hearing such as the HEW hearing in this case? (3) If hearsay evidence is admissible over objection in an administrative agency hearing, such as that of the HEW in this case, is such hearsay evidence, standing alone and without more, substantial evidence?

We will consider these questions in the order given. It is our view that this case is an appealable one. We think this question is governed by the provisions of 42 U.S.C. § 405(g) which provides:

* * * *

> (g) The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. * * * The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary * * *. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

It will be noted that this statute authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The statute also states that such judgments "shall be final except that it shall be subject to review in the same manner as a judgment in

other civil actions." Of course, 28 U.S.C. 1291 gives the courts of appeals jurisdiction to review appeals from all final decisions of the district courts.

It appears clear to us that here where the district court entered an order denying the motions for summary judgment and reversing the decision of the Secretary and remanding the case to the Secretary for a full new hearing, in accordance with his order of remand, the case is an appealable one. See *Jamieson* v. *Folson*, 7 Cir., 1963, 311 F. 2d 506, *cert. denied*, 374 U.S. 487, 83 S. Ct. 1868, 10 L. Ed. 2d 1043 (1963); *Gardner* v. *Moon*, 8 Cir., 1966, 360 F. 2d 556, 558; and *Celebrezze* v. *Lightsey*, 5 Cir., 1964, 329 F. 2d 780.

Also we think the remand order is final within the meaning of 28 U.S.C. 1291. The finality requirement of this section has usually been given a practical rather than a technical construction. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964).

It should be noted that not all orders under 42 U.S.C. § 405(g) are appealable. In situations where the Secretary moves the court before he files an answer, or at the request of either party, the court remands the case for additional evidence, the order would not be appealable. An order remanding the case for additional or supplementary evidence, without a review by the court of the administrative record nor a decision by it on the substantial evidence question, is without doubt an interlocutory order and is not appealable. Likewise, an order *sua sponte* by the court for the taking of additional evidence is not appealable. *Bohms* v. *Gardner*, 8 Cir., 1967, 381 F. 2d 283, *cert. denied*, 390 U.S. 964 (1968).

In the case before us, the court not only denied the motions for summary judgment and reversed the decision of the Secretary, but also established standards for the admission of hearsay evidence and indicated that hearsay evidence is not substantial evidence. Unless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may

be the substantiality of the evidence, and not its admissibility. This seems to us to fit the rationale of the decision in *Cohen* v. *Beneficial Loan Corp., supra,* where the Court said:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. * * *. *Id.* at 546.

Accordingly, we conclude that the case is an appealable one, and we deny the motion of appellee (claimant) to dismiss the appeal.

We next consider the question of whether or not hearsay evidence, when objected to, is admissible in an administrative hearing, such as the hearing in this case. The claimant contends that the admission of hearsay evidence denies him the right to be confronted by his adversary witnesses and the right of cross-examination. We must look first to the statute enacted by Congress governing this problem. We find that 42 U.S.C. § 405 (a) and (b) provides:

> (a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.
>
> (b) Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Also, it must be noted that in accordance with the statute quoted above, the Secretary has promulgated the fol-

lowing rules and regulations with respect to evidence and procedures to be followed in hearing before him:

20 C.F.R. 404.926 provides, in pertinent part:

> When reasonably necessary for the full presentation of a case, a hearing examiner or a member of the Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the hearing examiner or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to be found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. * * *

20 C.F.R. 404.927 provides, in pertinent part:

> * * * The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. * * * The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

20 C.F.R. 404.928 provides, in pertinent part:

> Evidence may be received at the hearing even though inadmissible under rules of evidence applicable to court procedure * * *.

It will be observed that the above statute as well as the regulation issued by the Secretary provide that:

> Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

This provision of the statute and regulation clearly authorize the admission of hearsay evidence into the record of an administrative hearing of the HEW such as that involved here. The claimant and the Bexar County Legal Aid Society, who appear here as an *amicus curiae*, contend that the Administrative Procedure Act entitles the claimant to the right of cross-examination and that the admission of hearsay evidence denies him that right. They cite the provision of the Act in 5 U.S.C. § 556(d) which provides:

> * * * A party is entitled to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

However, the Administrative Procedure Act further provides that its provisions:

> * * * [D]o not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute.[1]

We conclude that the Administrative Procedure Act does not control the method of conducting hearings under the Social Security Act, if in conflict therewith, and the right of cross-examination provided for in the former will not prevail over the procedures established by the Secretary under the latter statute.

The claimant points to the case of *Southern Stevedoring Co.* v. *Voris*, 5 Cir., 1951, 190 F. 2d 275, as authority for the inadmissibility of hearsay medical reports. We do not think that case is controlling here for several

[1] 5 U.S.C. § 556(b).

reasons. In the first place, the provisions of the two laws involved are different. In the next place, the inadmissibility of the reports was being asserted there by a party against whom a money judgment was sought. That is quite a different situation to that existing in the case at bar. Here, the claimant is claiming disability benefits under a law of Congress. In such a case the Congress has the right to establish procedures and regulations the claimant must comply with before he is entitled to these benefits. So long as these procedures are not unfair, arbitrary, discriminatory, and do not deprive the claimant of the opportunity to present his claim in an adequate and comprehensive manner, he is required to comply with them. Furthermore, in the *Southern Stevedoring Co.* case, *supra*, the court held that the provisions of the Administrative Procedure Act as to cross-examination applied in that case. The court said:

> * * * Moreover, sec. 7(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1006(c), expressly provides that "Every party shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts. *Id.* at 277.

We have already pointed out that this section of the Administrative Procedure Act does not apply to hearing procedures under the Social Security Act which is involved here.

The claimant complains of the admission of hearsay evidence and the denial of confrontation of adverse witnesses and the right of cross-examination as if they were all one and the same. Actually, they are different and must be treated separately. While it is true that the admission of hearsay testimony denies the claimant the right of cross-examination, at least temporarily, still, he has his remedy under the regulations issued by the Secretary. These regulations give the hearing examiner the authority to subpoena witnesses on his own motion or at the request of a party.[2] While it is true the regula-

[2] 20 C.F.R. 404.926, *supra*.

tions require a party to request subpoenas for witnesses five days before the hearing, and a claimant might not know at that time what witnesses he would need to subpoena in order to cross-examine the authors of hearsay evidence to be introduced by the Secretary, still he could ask for a postponement or a supplemental hearing in order that he might have the witnesses present. If this was refused, he would have a valid objection that could be urged on appeal. But that is not the case here. Actually, there was a supplemental hearing in this case. The claimant could have requested subpoenas for the absent doctors requiring them to be present at the later hearing, but he did not do so. The cases are clear that where a party has the right to subpoena witnesses by requesting the agency representative to issue them, and he does not make the request, he cannot later complain of the fact that he has been denied the right of confrontation of adverse witnesses and the right of cross-examination. See *Williams* v. *Zuckert*, 371 U.S. 531, 83 S. Ct. 403, 9 L. Ed. 2d 486 (1963) and 372 U.S. 765, 83 S. Ct. 1102 10 L. Ed. 2d 136 (1963); *Begendorf* v. *United States*, 169 Ct. Cl. 293, 340 F. 2d 362 (1965); *McTiernan* v. *Gronouski*, 2 Cir., 1964, 337 F. 2d 31, 37.

However, as pointed out above, this is entirely different to the objection of claimant to the admission of hearsay evidence. The correct rule as to the admission of hearsay evidence by an administrative agency was stated by the court in *Morelli* v. *United States*, 177 Ct. Cl. 848, 853-54 (1966) as follows:

> * * * [T]he hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value.

To the same effect is *Montana Power Co.* v. *Federal Power Commission*, D.C. Cir., 1950, 185 F. 2d 491, 497, *cert. denied*, 340 U.S. 947, 71 S. Ct. 531, 95 L. Ed. 683 (1951); and *Willapoint Oysters, Inc.* v. *Ewing*, 9 Cir., 1949, 174 F. 2d 676, 690, *cert. denied*, 338 U.S. 860, 70 S. Ct. 101, 94 L. Ed. 527 (1949).

We conclude that the hearsay evidence in this case was admissible under the Social Security Act. See *Rocker* v. *Celebrezze*, 2 Cir., 1966, 358 F. 2d 119, 122. However, this does not solve the entire problem in the case. The overriding issue and the one that actually and properly concerned the trial court was whether or not the hearsay evidence received by the examiner was substantial evidence on which he could base his decision. While the trial court did not specifically decide this question, his order of remand and memorandum opinion made reference to it, and for all practical purposes held the hearsay evidence was not substantial evidence.[3] Since the problem will arise in the next trial of the case, and is involved in three other cases now held in suspense,[4] we will consider it here for the benefit of the Secretary and the trial court.

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[3] The memorandum opinion stated in part as follows:

Except in unusual circumstances, and none are shown to exist in this case, this Court is reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination. *Ratliff* v. *Celebrezze*, 338 F. 2d 987, 982 (6 Cir. 1964); *Mullen* v. *Gardner*, 256 F. Supp. 588 (E.D.N.Y. 1966).

Similarly, the opinion of a doctor who has never examined or treated a claimant, is entitled to little or no probative value, especially when it is opposed by evidence of a substantial nature, including the oral testimony of an examining physician. See *Hayes* v. *Gardner*, 376 F. 2d 517 (4 Cir. 1967).

Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicians are received as original evidence on the critical issue of plaintiff's physical condition, a non-examining medical expert is then allowed to "interpret" those *ex parte* reports, and that "interpretation" forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding hearsay upon hearsay, which, under the circumstances of this case, violates the fundamental rule of fair play and cannot be permitted to stand. *Id.* at 1a(S) and 2a(S) of Supplemental Record.

[4] The trial court is now holding in abeyance three other cases involving the same issues as those involved here, awaiting the outcome of this case. They are *Baker* v. *Cohen*, No. 26670; *Cohen* v. *Riley*, No. 26247; and *Cohen* v. *Hammonds*, No. 26243.

This brings us to a consideration of the third question mentioned above, namely, is the hearsay evidence in this case, standing alone and without more, substantial evidence?

The Supreme Court defined substantial evidence in *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300, 59 S. Ct. 501, 83 L. Ed. 660 (1939) as follows:

> * * * [F]indings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co.* v. *National Labor Relations Board*, 301 U.S. 142; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board* v. *Thompson Products Inc.*, 97 F. 2d 13; *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board*, 98 F. 2d 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board, supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U.S. 521, 524; *Gunning* v. *Cooley*, 281 U.S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra*, 989.[5]

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[5] See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966); *Coomes* v. *Ribicoff*, 209 F. Supp. 670, 671 (D. Kan. 1962); *Sandusky* v. *Celebrezze*, 210 F. Supp. 219, 223 (W.D. Ark. 1962); *Clifton* v. *Celebrezze*, 228 F. Supp. 251, 255 (N.D. Tex. 1964); *Scott* v. *Celebrezze*, 241 F. Supp. 733, 736 (S.D.N.Y. 1965); *Farnsworth & Chambers Co.* v. *United States*, 171 Ct. Cl. 30, 37-38, 345 F. 2d

The rule announced in the *Morelli* case *supra*, and the other cases cited above, allow hearsay evidence to be received by administrative agencies *"so long as the evidence upon which a decision is ultimately based is both substantial and has probative value."* (Emphasis supplied.) The Supreme Court held many years ago in the case of *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 230, 59 S. Ct. 206, 83 L. Ed. 126 (1938):

> * * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

In *Willapoint Oysters, Inc.* v. *Ewing*, *supra* the court said:

> * * * "[S]ubstantial evidence" includes more than "uncorroborated hearsay" * * *. *Id.* at 691.

In *Hill* v. *Fleming*, 169 F. Supp. 240 (W.D. Pa. 1958), the court held:

> In our opinion these hearsay statements, in the light of the whole record, are not substantial evidence * * *. A finding of ultimate fact not reasonably supported by substantial evidence should be set aside. * * * *Id.* at 244.
>
> Mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Id.* at 245.

In *United States* v. *Krumsiek*, 111 F. 2d 74, 78 (1st Cir. 1940), the court stated:

> Conclusion of facts must be supported by substantial evidence. * * * "Substantial evidence is more than a mere scintilla. * * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.* at 78.

In 32A C.J.S. Evidence § 1016 (1964), it is stated:

> * * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence, nor does inher-

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577, 582 (1965); *Loral Electronics Corp.* v. *United States*, 181 Ct. Cl. 822, 832, 387 F. 2d 975, 980 (1967); Robert M. Viles, *The Social Security Administration Versus The Lawyers * * * And Poor People Too*, 40 Miss. L.J., 24, 36-52.

ently improbable testimony, a guess, or surmise, conjecture, or speculation. *Id.* at 631.

In *Frank Camero* v. *United States*, 170 Ct. Cl. 490, 493-94, 345 F. 2d 798, 800 (1965), the court held:

> * * * The Supreme Court has construed "substantial evidence" to be "* * * more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). The Court added (at 230), "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." * * *

The *Consolidated Edison Co.* case, *supra*, is unquestionably a correct statement of the law. See *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257, 59 S. Ct. 490, 83 L. Ed. 627 (1939); *NLRB* v. *Columbian Enameling & Stamping Co.*, *supra*; and *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

In *Willapoint Oysters, Inc.* v. *Ewing*, *supra*, the court held that hearsay evidence was admissible in an agency hearing, saying:

> * * * The receipt of irrelevant, immaterial and hearsay evidence is no cause for reversal of an administrative order though the validity of the order can never rest upon conjecture, guess or chance. *Id.* at 690.

However, the court stated that the findings must be in accord with substantial evidence, and could not be based on hearsay alone, stating:

> * * * However, since *"substantial evidence" includes more than "uncorroborated hearsay" and* "more than a mere scintilla," *the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla.* * * * [Emphasis supplied.] *Id.* at 691.

We think the court correctly stated the law in *NLRB* v. *Amalgamated Meat Cutters*, 9 Cir. 1953, 202 F. 2d 671, 673, when it said:

> * * * [A]gency findings "cannot be based upon hearsay alone".[6]

The testimony of the "expert" Dr. Leavitt, cannot serve to corroborate the hearsay reports of the absent doctors. His testimony was correctly described by the trial court as "hearsay on hearsay." Multiple hearsay is no more competent than single hearsay. *United States* v. *Grayson*, 2 Cir., 1948, 166 F. 2d 863, 869; *United States* v. *Bartholomew*, 137 F. Supp. 700, 709 (W.D. Ark. 1956).

Accordingly, we hold that mere uncorroborated hearsay or rumor does not constitute substantial evidence.[7]

Furthermore, the agency must look at the record *as a whole* and not just to the part of it that coincides with its views. *Universal Camera Corp.* v. *NLRB*, *supra*; *Farnsworth & Chambers Co.* v. *United States*, *supra*; *Loral Electronics Corp.* v. *United States*, *supra*.

Applying these principles to the case before us, it is clear that the hearsay reports of the absent doctors were admissible in evidence before the hearing examiner. This is also true with respect to the testimony of the so-called "expert" Dr. Leavitt. However, this leaves the Secretary with nothing but uncorroborated hearsay, which the claimant has objected to, on which to base his decision. Under the decisions, such evidence is not substantial evidence. This is especially true in view of the fact that on the other side of the case we have the live and direct legal testimony of the claimant and his doctor which supports his claim. The trial court was correct in his remarks in the record that if he was called upon to ren-

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[6] The case here is to be distinguished from the case of *James Alvin Peters* v. *United States*, —— Ct. Cl. —— [No. 426-66, March 14, 1969], in which the writer dissented, where the court held that the alleged hearsay evidence was admissible as a declaration against interest and as an exception to the hearsay rule.

[7] See also *Conn* v. *United States*, 180 Ct. Cl. 120, 130, 376 F. 2d 878, 883 (1967).

der a final judgment in the case, he would render it for the claimant and against the secretary, because the only probative evidence in the case that was not hearsay and that was substantial was in favor of the claimant.[8] We agree that he would have been justified in entering judgment for the claimant for disability benefits in view of the foregoing and based on the law announced by the courts in other similar cases, a discussion of which follows:

The case of *Mefford* v. *Gardner*, 6 Cir., 1967, 383 F. 2d 748, 759-61, was very similar to the case before us. The claimant and his doctors who had treated him testified he was disabled. The examiner had an "expert" doctor (Dr. London) to examine the various medical reports the examiner had introduced and then testify, without ever having seen or treated the claimant, to the effect the claimant was not disabled. This is exactly what Dr. Leavitt did in the case here. The court in that case held that such testimony was not substantial evidence, stating:

> Such a statement as Dr. London's cannot be considered substantial evidence in view of the fact that he never saw or examined appellee, and in face of the medical evidence of physicians who not only treated him over a long period of time but also examined him and came to the determination that he was totally and permanently disabled. *Id.* at 759.

The case of *Hayes* v. *Gardner*, 4 Cir., 1967, 376 F. 2d 517, is another instance where this same procedure was followed. There a Social Security Administration doctor, named Dr. Glendy, did not examine the claimant but based his testimony that the claimant was not disabled on an examination of the medical record. The claimant and the doctor who had been treating her testified she was disabled. The court held that Dr. Glendy's testimony was not substantial evidence. In this connection, the court said:

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[8] See pp. 36a and 37a of the Record.

> * * * We reach the conclusion that, * * * the opinion of a doctor who never examined or treated the claimant *cannot serve as substantial evidence* to support the Secretary's finding. [Emphasis supplied.] *Id.* at 520-21.

The courts reach the same decision even if the Secretary's expert doctor has examined the claimant (usually one time) for the purpose of testifying. This occurred in *Sebby* v. *Flemming*, 183 F. Supp. 450 (W.D. Ark. 1960). The testimony of the Secretary's doctor that the claimant was not disabled conflicted with that of the claimant's doctors who had been treating him. The court said:

> After reading and considering the whole of the record, the court does not find that the Referee's conclusions are supported by substantial evidence. * * *
>
> * * * *
>
> The only evidence in support of the Referee's findings is the medical report of Dr. Hall, [the Secretary's doctor] based upon one examination of the plaintiff. * * * *Id.* at 454.

In *Colwell* v. *Gardner*, 6 Cir., 1967, 386 F. 2d 56, the Secretary's doctor, after one examination of the claimant, testified that he was not disabled. This conflicted with the evidence of the doctor who had been treating the claimant. The court held that the evidence of the Secretary's expert was not substantial evidence, and the decision of the examiner based upon it could not be sustained.

It appears from the facts in many of the foreging cases, as well as in the one before us, and we assume in those cases being held in abeyance by the trial court, that there is a widespread practice by hearing examiners of having testifying doctors accompany them, and, in a manner of speaking, "ride the circuit" with them, for the purpose of examining medical records and reports of claimants and then testifying as experts, with or without a cursory examination of the claimants, as to their disability. This procedure should be frowned upon, if

not eliminated altogether. Such testimony is not substantial evidence, and, if objected to, will not, standing alone, support a decision of the examiner adverse to the claimant. This is especially true when such testimony is in conflict with that of the claimant and his doctor who has not only examined him but has also treated him over a long period of time.

The claimant objected to the introduction into evidence of the medical reports and records of the absent doctors on the ground that they were hearsay and not substantial evidence. We agree that they were hearsay, but, as stated above, were admissible into evidence before the examiner. However, we conclude that they were not substantial evidence. The decision of the court in *Hill* v. *Fleming*, *supra*, is a case in point. The facts in that case are very similar to those in the instant case with respect to the admission of medical records and reports of absent doctors into evidence before a hearing examiner over the objection of the claimant that they were hearsay. In that case a librarian of a medical clinic was permitted by the examiner to make a report of some of the contents of the medical records of the clinic as to examinations and treatment of the claimant that were adverse to him. The court in that case held that the librarian's report was hearsay and was not substantial evidence. The court said:

> In our opinion these hearsay statements, in the light of the whole record, are not substantial evidence to negative either the plaintiff's disability or his incapacity since prior to March 31, 1948 to engage in any gainful occupation. The record as a whole leaves the conclusion of the Council and Referee on the ultimate facts without reasonable foundation. * * *
>
> * * * *
>
> In our opinion this secondhand hearsay evidence submitted by the Librarian of Falk Clinic is too remote and not at all probative of the ultimate facts in issue and hence is not substantial evidence to support the conclusions and decision of the Council.

Mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Consolidated Edison Co. of New York* v. *National Labor Relations Board*, 1938, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board* v. *Amalgamated Meat Cutters*, 9 Cir., 1953, 202 F. 2d 671, 673.

The evidence on which the Council and Referee purported to rely is not only of "small probative value" but "in relation to the type of evidence reasonably anticipated in the circumstances of the case, that very slight proof must be characterized as unsubstantial." At most it was "handpicked fragments of evidence" merely enough to raise a "suspicion".

In our opinion there was no substantial evidence to contradict the medical opinions that plaintiff was totally and permanently disabled; neither was there any affirmative evidence that he had or could have, in view of his limited education and physical condition, engaged in any substantial gainful employment. *Id.* at 244-45.

As we have already pointed out, the trial judge could have entered a judgment in favor of the claimant for disability benefits, because the only substantial evidence before him was in favor of the claimant. However, in his commendable efforts to be fair to both parties, he remanded the case to the Secretary for a full new hearing. In view of the fact that not only the instant case, but also the three cases being held in abeyance by the trial court, will be disposed of in accordance with the guidelines which we have laid down in this opinion, we conclude that the order of the trial court should be affirmed.

Accordingly, we deny the claimant's motion to dismiss the appeal and affirm the judgment of the trial court, and remand the case to the Secretary for a full new hearing before a different examiner as ordered by the trial court and in accordance with this opinion.

AFFIRMED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 26238

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

Appeal From the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(October 10, 1969)

Before COLEMAN and GOLDBERG, Circuit Judges, and SKELTON, Judge of the Court of Claims*

PER CURIAM.

Attorneys representing the administrative Law Section of the American Bar Association have filed an Amicus Curiae Brief in this case in which they urge the court to modify its opinion so as to hold that the Administrative Procedure Act applies to and governs hearings on disability claims under social security legislation, and especially with respect to the right to cross-examination. We have carefully considered this brief, but have concluded that our decision in our original opinion is correct in this regard.

The Secretary of HEW has filed a Petition for Rehearing and a Suggestion of Rehearing En Banc. He has apparently misconstrued our opinion because the main thrust of his Petition for Rehearing is to the effect that under our decision uncorroborated hearsay evidence could

* Sitting by designation as a member of this panel.

never be substantial evidence that would support a decision of a hearing examiner adverse to a claimant in a social security disability case. Because of this erroneous interpretation of our opinion, the Secretary raises the spectre of a large increase in the number of cases of this kind that would have to be litigated in Court because of our opinion. He intimates that our decision would require medical witnesses of the HEW as well as those of the claimant to always testify in person at the hearing. All of these positions are unfounded.

Our opinion holds, and we reaffirm, that mere uncorroborated hearsay evidence as to the physical condition of a claimant, standing alone and without more, in a social security disability case tried before a hearing examiner, as in our case, is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by the claimant who testify in person before the examiner, as was done in the case at bar. This is especially true if the claimant requests that the absent medical witnesses of the HEW who authored the hearsay evidence, be subpoenaed to testify at the hearing and the examiner fails or refuses to summon them.

When these conditions are not present, there is nothing to prevent an examiner from basing his decision, which is adverse to the claimant, on hearsay medical evidence, if such evidence has sufficient probative force to support his decision.

We are not impressed with the Secretary's argument that our opinion will cause an increased number of social security disability cases to be filed in court, as we do not believe this will happen. But even if this should be the result, it would not be persuasive. If it should become necessary for the courts to try more of these cases in order to dispose of all of them in accordance with law, they will not shirk their responsibility in this regard. We realize that the HEW is required to handle thousands of these cases each year and is no doubt anxious to simplify the procedure for disposing of them. However, each

case is different from the next one and must be tried and decided on its particular facts and according to law. It is not possible for a case of this kind to be decided through a stereotyped procedure that resembles the working of a computer. A social security disability claimant and his employer have paid for his coverage under the social security law whether they wanted it or not. He should not be denied the benefits of this law solely by hearsay evidence under the conditions outlined in our opinion.

The Secretary contends that if medical witnesses are required to testify in person, this will increase the costs of the hearings and many of them will refuse to serve. If the costs are increased, they will be paid out of the social security trust fund to which the claimant has contributed. This is one of the purposes of the fund. If a doctor refuses to serve, another can be obtained. Litigants in other types of personal injury and disability cases manage to acquire the evidence of medical witnesses. There is no reason to excuse the HEW from this requirement in a proper case. These arguments involve details that have little if anything to do with the merits of the case before us.

The Petition for Rehearing is *Denied* and no member of this panel nor Judge in regular active service on the Court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is *Denied.*

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26238

D.C. Docket No. Civ. 67-77-SA

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

Appeal From the United States District Court for the Western District of Texas

Before COLEMAN and GOLDBERG, Circuit Judges, and SKELTON, Judge of the Court of Claims*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration Whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed and this cause be, and the same is hereby remanded to the Secretary for a full new hearing before a different examiner as ordered by the trial court, and in accordance with the opinion of this Court;

It is further ordered, that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

MAY 1, 1969.
Issued as Mandate: October 22, 1969.

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* Sitting by designation as a member of this panel.

SUPREME COURT OF THE UNITED STATES

No. 1302, October Term, 1969

ROBERT H. FINCH, Secretary of
Health, Education and Welfare, PETITIONER

v.

PEDRO PERALES

ORDER ALLOWING CERTIORARI—Filed April 20, 1970

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

No. 1302, October Term, 1969

ROBERT H. FINCH, Secretary of
Health, Education and Welfare, PETITIONER

v.

PEDRO PERALES

ON CONSIDERATION of the motion of the respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 20, 1970

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration
BUREAU OF HEARINGS AND APPEALS

NOTICE OF HEARING

In the case of

Pedro Perales
(Claimant—Wage Earner)
465-38-6398
(Social Security Account Number)

Claim for Period of Disability and Disability Insurance Benefits

TO: Mr. Pedro Perales
618 Avenue A
San Antonio, Texas 78207

Pursuant to your written request and provisions of section 205(b) of the Social Security Act, a hearing will be held by the undersigned, a Hearing Examiner of the Bureau of Hearings and Appeals on the 12th day of January 1967 at 9:00 a.m. o'clock in Room 215 (Grand Jury Room) of U.S. Post Office & Courthouse Building,

615 E. Houston, San Antonio, Texas
(Number and Street) (City) (State)

The general issues to be determined are whether you are entitled to a period of disability under section 216(i) and to disability insurance benefits under section 223(a). The specific issues to be decided are: (1) Whether you have the required insured status under the law; and, if so, as to what date(s); (2) The nature and extent of your impairments; (3) Whether your impairment can be expected to be of indefinite duration or to result in death; (4) Your ability to engage in substantial gainful activity since your impairment began; (5) When your disability, if any, began, and how long it has or can be expected to continue.

This hearing involves your application(s) filed on April 20, 1966.
(Date)

You should be prepared to prove that you were under a disability on or before date of the hearing.
(Date)

It may be to your interest to have your physicians appear at the hearing at your own expense to testify on your behalf. Be prepared to furnish: your entire work history, including names of employers, dates of employment and a *description of duties performed*; schools and training; names of physicians who have examined or treated you; and periods of hospitalization with names of hospitals.

READ THE OTHER SIDE OF THIS NOTICE FOR IMPORTANT INFORMATION REGARDING HEARING

REMARKS:

IMPORTANT—Please sign and return at once the enclosed postal card notifying me whether you will be present at the above time and place. No postage is required on this card.

/s/ Frank J. Buldain
(Hearing Examiner)

January 2, 1967
(Date)

P. O. Box 61529
(Mail Address)

Houston, Texas 77061

cc: Representative
Richard Tinsman, Esq.
National Bank of Commerce
San Antonio, Texas

Telephone: CA. 8-0611, ext. 4357
(Name and Address)

Form HA—507.1a
(1-64)

(Over)

HEARING FILE

Wha INFORMATION

An individual wh*nt by "Disability"*
gainful activity ble to engage in any substantial
cal or mental im injury, illness, or other physi-
for a long and which is expected to continue
improvement, or a time without any significant
a "disability." e in death, may be found under
tion of disabilit dual would not meet the defini-
his impairment reasonable effort and safety,
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should be estab and extent of the impairment
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The date and
especially for *nce at Hearing*
reason may ca
Even though t is hearing have been set aside
delay dispositi failure to appear without good
preventing yo l of your Request for Hearing.
card stating th reason, any postponement will
Examiner pro case. If an emergency arises
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sented in your case: (1) A report from each doctor who has examined or treated you; (2) The results of laboratory tests and clinical findings; (3) Copies of medical evidence submitted to insurance companies, the State Compensation Commission; (4) Hospital records. If you find it impossible to obtain these latter records, notify the Hearing Examiner promptly before the day of the hearing. The Hearing Examiner may ask you to undergo a medical examination which will be performed at no expense to you.

The Hearing Examiner will question you about the types and dates of your past employment, earnings, schools you attended, special training and present daily activities.

You should be prepared to give such information at the hearing.

Conduct of Hearing

You will have an opportunity to examine the documentary evidence on the day of the hearing. If you wish to examine it before the day of the hearing you may do so at the Hearing Examiner's office.

At the hearing the Hearing Examiner will inquire fully into the matters at issue. You may present evidence either in the form of written documents or the testimony of witnesses, or both. You may bring your own physicians or other witnesses to testify on your behalf. If necessary, the Hearing Examiner may ask the doctor who examined you to appear, and may bring in a vocational expert to testify. Your testimony and that of any witnesses will be under oath or affirmation, and a verbatim record of the proceedings will be made. You may suggest findings of fact or conclusions of law and present arguments orally or in writing.

Representation

While it is not required, you may be represented at the hearing by a lawyer or other qualified person of your choice, if you desire assistance in presenting your case. If your representative is not a lawyer, an appointment

signed by you is required; a form for this purpose may be obtained from any local district office or from the Hearing Examiner at or before the hearing.

If you have a representative you are responsible for paying his fee. The regulation permits the lawyer to charge a specified fee without approval. The Hearing Examiner's authorization is required if the lawyer wishes to charge a larger fee, or a non-lawyer wishes to charge any fee.

If you have any other questions, your local Social Security district office will be glad to help you.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social Security Administration
Bureau of Hearings and Appeals

In the case of:	Claim for:
Pedro Perales, Jr. (Claimant)	Period of Disability and Disability Insurance Benefits
Pedro Perales, Jr. (Wage Earner)	465-38-6398 (Social Security Account Number)

HEARING HELD

in

Room 215, U. S. Post Office & Courthouse Bldg.
615 E. Houston Street, San Antonio, Texas
on
January 12, 1967

APPEARANCES:

PEDRO PERALES, JR., Claimant
MAX MORALES, JR., M.D., Witness
RICHARD TINSMAN, Attorney for Claimant

Hearing Examiner
FRANK J. BULDAIN

Hearing Assistant
IRENE B. GREENE

INDEX TO TRANSCRIPT OF HEARING

Pedro Perales, Jr., Claimant-Wage Earner
Social Security Account Number 465-38-6398

[fol. 34] (The following is a transcript of the hearing held before Frank J. Buldain, a Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare, on January 12, 1967, in San Antonio, Texas, in the case of Pedro Perales, Jr., a claimant for disability insurance benefits based on his own earnings record, social security account number 465-38-6398. The claimant was represented at the hearing by Richard Tinsman, Attorney at Law.)

(The hearing commenced at 9:00 a.m., on January 12, 1967)

OPENING STATEMENT BY HEARING EXAMINER:

Examiner: The hearing will come to order. This is an appeal by Pedro Perales, social security account number 465-38-6398, from a denial of his claim by the Bureau of Disability Insurance of the Social Security Administration, for a period of disability and for disability insurance benefits. The claimant is represented by Mr. Richard Tinsman, a licensed practicing attorney in the State of Texas, and it is my understanding that you are planning for Dr. Morales to appear?

Attorney: Yes, sir, I made arrangements for him to appear.

Examiner: Well, we will go ahead with some of the proceedings and see—he may show up in the meantime.

Let me make a few preliminary remarks about the procedure so that you won't be completely in the dark. I will ask you—have you ever appeared before a hearing of this nature?

Mr. Tinsman: No, I have not but I have talked to other lawyers that have.

[fol. 35] Examiner: Well, you probably learned it is quite informal. The hearing examiner is not a judge—on the other hand, he does have some authority. We have authority to issue subpoenas; we try to give direction to the hearing; witnesses are sworn—as you can tell, Mrs. Greene is recording everything that is said, it will be made a matter of record.

Under the administrative procedures, we are not bound by the formal rules of evidence, we are not concerned about the hearsay rule and many similar rules. Many of these rules are questionable. Some of the rules in some circumstances are absolutely worthless; some others were corporated and tied in and quite valuable.

Examiner: I believe you've had an opportunity to examine the list of exhibits?

Attorney: Yes, sir, I have.

Examiner: Do you have objection to the introduction of any of them or parts of them?

Attorney: Yes, sir, I do. Let me say this in regard to hearsay objections. Judge Spears and others have wished the lawyers to object on any objections we may have well knowing the hearing examiner may overrule. Judge Spears says he may have a different ruling, and probably I have numerous objections.

(The attorney takes the exhibits)

Attorney: Since Mr. Perales has filed the application for disability benefits, we have no objection No. 1 or No. 2 which he signed. We do object to No. 3 on the grounds that nowhere is this signed by Mr. Perales. It's simply a report of the examiner's impressions of the disability interview, and in no way gives any pretense to being a complete interview and it is not signed by Mr. Perales. So for that reason we feel the same is hearsay and in [fol. 36] effect the examiner is acting as a judge in this interview as to what to put down and what not to. We have no objection to the earnings certification—exhibit 4—except we will bring out that when Mr. Perales worked for Jim Walters Corporation, that in addition to the work he was doing as a laborer, he also sold houses for him on the weekend and they credited the earnings to his wife.

Examiner: That would have no bearing on the merits of this case.

Attorney: I think it has merit on the question of the amount of earnings this man was able to make before and the fact that—whether or not he has, in truth, not worked any since then.

Examiner: The purpose of this certification is purely to establish whether or not he has insured status and doesn't relate to the matter of his condition.

Attorney: Yes, sir. No. 5 is simply a finding—we object to any fact findings that are contained in there but for the purpose of the records, is necessary. No. 6 is signed by Mr. Perales—we have no objection to that. Exhibit No. 7 is an interviewer's report. It does not even say who made this, and we object on the grounds, number 1, it's hearsay—we don't know who made the report and it clearly shows on its face that it's not a complete resume of what went on but only the interviewer's impressions. The interviewer could put in something he feels is significant and could have wrote something else he feels is not significant. Exhibit 8—we object to any fact or conclusions found there and also a jurisdictional type document at this hearing. I don't understand what No. 9 is—we object to it because it appears to be simply a resume of other things contained in the folder, and, as such, it doesn't state who made this.

[fol. 37] Examiner: Let me make a remark or two at this time. I think a number of your objections could be quite valid from a point of law. I'd like to point this out. The reports of contact which were unsigned there and which could obviously be unfair were made by representatives in the scope of their employment. They are there to, along with other documents, they just sort of give the hearing examiner a background of what has happened. They are not really necessary proofs. I think you will find as we proceed here that the really important things here are the testimony of the claimant, testimony of doctors, and when we don't have a doctor—we don't always call the doctor in. The reports are made by the doctors and we feel that their reports are pretty accurately and carefully made. They may make mistakes, and where there is a contest between doctors as to what has happened, we have a full-blown hearing; we get into the evidence later—we have a little contest here between Dr. Morales and the other doctors. The statute to the Social Security Act, section 216(i), requires that the inability to engage in any substantial gainful activity be—and here I'm quoting, "by reason of any medical determinable physical or

mental impairment." In other words, that has been construed to indicate that we have to have the medical clinical findings—any temperature, blood pressure, things like that, to show the impairment, and the conclusion that this man is sick without giving his background by the doctors who examined him is not sufficient.

Attorney: Well, actually all the disability here is favorable to Mr. Perales but to be consistent in the objections, that's why I objected to them.

[fol. 38] Examiner: I'm giving you this background so that you won't concern yourself. You mentioned Judge Spears wants you to make every objection. Also, if this goes to appeal, I want Judge Spears to know that many of the things in there are really of no consequence in this hearing. The salient feature is decided in the decision and I don't think it's really too much to worry about because we do follow the Administrative Procedures Act. I just want to allay your fears that we are not going to grab up some statements from investigations made some five or six months ago, and make this conclusion and hang our hat on it and that sort of thing —I just want to allay your fears.

Attorney: For the record, I do want to make these objections.

Examiner: All right, sir. Will you go ahead with your objections?

Attorney: We object to any findings of fact on exhibit No. 9, on the fact this is simply an award which is being appealed which has no bearing on this appeal. We object to exhibit No. 13a, b, and c, on the grounds that the medical report by Dr. Langston is a hearsay report. Dr. Langston is not here for cross-examination to develop some of the things that he may have found and to question him on some of his findings. We object to exhibits 16c and 16d on the grounds that this is simply a medical report by James M. Bailey, and Dr. Bailey will not be here for cross examination. We further object that there is no showing that either Dr. Langston or Dr. Bailey is licensed to practice in the State of Texas, which is necessary in order to give competent testimony. We object to exhibit 17a and 17b which is a case development

sheet by Dr. Howard Moses for the reason that Dr. Moses apparently has never seen the claimant and any-
[fol. 39] thing that Dr. Moses said actually is just based on the evidence that he's examined and that's the function of the hearing examiner of the Social Security Administration. We object to exhibits 18a, 18b, and 18c on the grounds that this is hearsay information.

Examiner: Will you speak a little louder please?

Attorney: These are hearsay information and any records that are here from the Baptist Memorial Hospital have not been properly proved up under the Business Records Act. I will further object to exhibit 18c on the grounds that Dr. Langston did not conduct the EMG examination, and it's simply making an interpretation from a hospital record, and the person making the hospital record is not available for examination.

(Dr. Morales enters the hearing room at 9:25 a.m.)

Examiner: I have noted your objections and I will overrule them. I will certainly bear in mind your objections during the course of development, and if there appears some reason for striking any or all of these documents, I will certainly do so. The items identified as exhibits number 1 throufh 19 are hereby admitted into evidence.

Let me state briefly what appears to be the general and special issues. The general issue is whether or not the claimant is entitled to a period of disability under section 216(i) and to disability insurance benefits under section 223(a) of the Act. Specifically we have to determine whether he first had an insured status, and on that issue I think we can dispose of it right quick. I think according to the earnings certification he is covered through—could I see the certification a minute—I think it's July 30, 1970—it would be through September 30, 1970, he would have insured status through that date. Secondly, we want to determine the nature and severity of the im-
[fol. 40] pairments that he has because you realize that there are many people who have physical impairments that are still able to work. We have to take into account many things such as their age, their education, training

they have received, even their personality enters into it at times. There are just so many factors and you can't come up with a concrete rule and say this is the test. You take all of these things, and the jobs that are available in and around the community where he lives, similar to his training and education, that he can perform. As I stated before, the severity of the impairment—we have people with some ailments that are extremely impaired that are ably engaged in gainful activity. I point out a case we have. We have a vocational advisor sometimes that appears to testify in Houston. He is a paraplegic from the waist down but because of his training, and so on, he is a vocational consultant; he works for Texas Institute for Vocational Rehabilitation and he does a wonderful job.

Attorney: I think this depends on the education the man has. We have Mr. Perales with a third grade education and he is not capable of doing that work.

Examiner: Third grade education, may I point out, can also be very meaningless because a person can acquire training later on, on the job. Sometimes a person with a very small amount of formal education is very well read and versed and extremely intelligent and probably have a lot more sense than some college graduates that I have met. So we take all of these things into account and sometimes it is a very difficult decision.

Next we have to determine the likely duration. In this case, I believe the onset of disability was September 1965. So he would under the rule of the '65 amendments to the Act—in other words, can his disability be expected to continue for a period of at least 12 months; before [fol. 41] that it had to be of long-continued and indefinite duration—now it's at least 12 months.

Then we have to determine, as I have indicated before, notwithstanding that he has an impairment, is he able to work at some type of gainful activity. Also, we have to establish when was the date of onset of this disability, when did he first become incapacitated because a person may have, for example, a slow development of a trial heart condition but he works for years and there comes a day when he can't; sometimes it's hard to establish the

date there. Those are the special issues which I would like for you to keep in mind this morning.

I want to point out this; at the hearing today—we have a right to hold supplemental hearings, we don't like to do it, sometimes it causes a hardship—Dr. Morales is here today, I didn't ask for a medical adviser to appear, I am not so sure that I would have even had I known Dr. Morales was going to be here, but depending on the developments today, I may want to take additional testimony—I don't know—and you will certainly have the opportunity to participate, if necessary. Sometimes if we have to in matters where there are needed legal documents, then you don't have to have a lawyer present—there is no examination; on the other hand, there are types of evidence where it is necessary that counsel be present in the taking of the testimony.

We are very informal and we don't throw the book at people. I'll try not to break in your train of thought; from time to time I may step in if there is a particular point I want to clarify. I will try to keep from it because I don't want to break into your train of thought. Also, please—particularly you, Mr. Perales—and doctor, and you Mr. Tinsman, I may say some things, I may ask a question—don't draw a conclusion that I am taking sides against you or that I'm taking sides for you. My [fol. 42] job is to develop the evidence regardless of whether it's helpful to the claimant or whether it's helpful to the government. Sometimes in my questioning you may think that maybe I am saying something favorable to you but it may be developing a point which may be unfavorable, so don't draw any conclusion to my remarks or from my questions. I'd like for it to be—for you to be perfectly relaxed and informal—we're just talking across the table.

Attorney: I would like to put on—get the testimony of Dr. Morales first so he can get back to his patients, even before we put on Mr. Perales, if that is satisfactory.

Examiner: It is satisfactory. I want to tell you this. I may ask Mr. Perales a question and it might be advisable for your doctor to be here. I'm going to leave it up to you; on the other hand, I may not have anything to

ask him—I just don't know what will develop. I leave it up to you.

Dr. Morales: I think you can handle it well enough without me being here.

Examiner: Well, let me swear in the witnesses then.

(The claimant and Dr. Morales are sworn in).

Examiner: Let me make one more statement. I don't know whether the doctor was in when I made this remark. I believe doctor you came in after I made this remark and I want to tell you so that you will bear this in mind when you testify. The statute—that's section 216(i) of the Act, requires that the inability to engage in substantial gainful activity be established and this is accordingly by reason of any medically determinable physical or mental impairment. Now the key word, "medically determinable", that's been construed—we have to have clinical and pathological data on which you reach a conclusion. In other words, to say a man is sick—if some doctor told you that you'd say, "well, how do you know he's sick?" We want to know what are the spe-
[fol. 43] cific findings that support that conclusion. So keep that in mind when you testify, please

INTERROGATION BY ATTORNEY: (Witness, Dr. Max Morales, first duly sworn, testified:)

Q. Would you state your name, please?

A. Max Morales, Jr., M.D.

Q. Dr. Morales, are you a licensed physician in the State of Texas?

A. I am.

Q. Could you give us a brief history of your medical training, sir?

A. I graduated from the University of Texas Medical School in Galveston. I did a one year internship at Robert B. Green Hospital and I'm in my fifth year of practice of medicine; I am a family physician and general practitioner.

Q. Has Mr. Pedro Perales been a patient of your's, sir?

A. Yes, he has. I saw him for the first time on the 18th of April 1966.

Q. When you first saw Mr. Perales, did you take a history from him, sir?

A. I took a short history on the very first day that he saw me. I was in a big hurry and I did not take a complete history. I took more history as we went along and I got to know him better, and that was the extent of my first time.

Q. What were the complaints that Mr. Perales made to you when he first came to see you, sir?

A. He told me that he had hurt his back while lifting a heavy load of which approximated some 250 pounds, and that he had severe pain in the spine, and went to [fol. 44] see Dr. Munslow, and Dr. Munslow diagnosed a slipped disc and a pinched nerve, and then he was referred to Dr. Lampert. He was somewhat vague; he tole me he had been operated on in Nix Hospital but I think what he meant there is that he had extensive work-up by Dr. Munslow at the hospital. I have treated him since that time, he has continued to complain of numbness and swelling of the lower extremities, his feet would swell, and he complained of severe back pain which he had constantly; this pain kept him from being able to work.

Q. Did you conduct an examination of Mr. Perales?

A. Yes.

Q. Will you tell us exactly what you did?

Examiner: What date is this we're talking about?

Attorney: First time you saw him, when you conducted examination; and what date was this, sir?

A. Thirteenth of April, '66. I had him drop his pants and let me examine the area of the back which was the area—well the center of his complaints. We had him go through the usual range of motions, tried to see how far he could flex the trunk, arms outstretched, down towards the floor, turned and twisted the trunk from side to side to see if there was any limitation of motion, hyperextension of the back to see if he was able to do that, examined the area for tenderness in this region, and the routine type of back examination that we do for complaints of low back pain.

Q. Now he had previously been to the hospital, and he had had a diagnosis of a ruptured disc. Would you tell us what this is, and how it effects the man?

[fol. 45] A. Would you amplify your question so I can understand you better?

Attorney: All right. Well, in the hospital report that has been introduced as an exhibit here in this hearing—

Doctor: Which hospital are we talking about?

Attorney: This is Nix Hospital report, doctor.

Dr. Morales: It reads, going down in the middle of this paragraph here on this report by a Dr. Ralph Munslow, "It is felt that for this reason that hemilaminectomy of the left L-5 would afford the patient additional decompression and this is carried out. After this has been done the dural sac bulges upward in a more normal position. Repeat inspection through the intact dura reveals no evidence of an intradural mass. Likewise the anterior aspect of the canal appears normal. Accordingly, the procedure is discontinued after the closure of the muscles, fascia, and the subcuticular layer being approximated with interrupted catgut and continuous dermos suture used to close the skin. (Note for record: this is being quoted from Nix Hospital report.)

Attorney: Can you just tell us in plain language what that means, sir?

Examiner: Let me see if I can't help you, Mr. Tinsman. Let me say I follow this, doctor, and that if I follow this, that's the description of the surgery as it is performed, is it not?

Dr. Morales: This appears to be a narrative report of pre-operative diagnosis reading here as probably protruded intervertebral disc; post-operative diagnosis is nerve root compression syndrome on the left side, and did a hemilaminectomy in which he goes on to say that—

Examiner: Where he describes the operative procedure?

Dr. Morales: That's right.

[fol. 46] Examiner: What was the question you had in mind?

Attorney: The question is, what was his condition before this and generally what is this procedure? What

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Q. Now would you tell us, on your examination, after you made the examination, what the diagnosis was that you made on Mr. Perales—what tests you gave to confirm this diagnosis?

Examiner: This was on the 13th of April, '66 that you are speaking about?

Attorney: Did you make the diagnosis on the first visit or did you go ahead and have additional—

Dr. Morales: No, I didn't make a diagnosis on the first examination. Let me qualify something here—you said this was going to be rather informal.

Examiner: Yes.

Dr. Morales: I'd like sort of to resound a discussion of my thinking.

Attorney: Yes, go ahead—read from your notes.

Dr. Morales: I think it will give a clear picture of what I think about this man. You take a man that walks in and says he hurts; he says another doctor put him in the hospital and made a lot of studies, operated on him, did this and this, you can't really jump to conclu- [fol. 48] sions and say, "oh, you got a strained disc or ruptured disc"—you can't make a supposition like that. If you ever learn anything about the patient it's because you work him up and the information arrives to you in a very slow, painstaking way. You go through the procedure of a routine physical examination, you try to get hold of all reports and conversations with the doctors to see what took place, you take x-rays, you may send him down to physical therapy, you yourself may do some treatments in your office in which you hope some of the information will begin to make itself clear. This is different from the time you get a patient that nobody has ever seen or laid his hands on them, but when you get a patient that's already been treated by another physician and had a lot of things done, series of studies made on him, then you don't just jump into and make a diagnosis right there.

Examiner: In other words, you make your own development?

Doctor: That's right. In other words, over a period of time, you feel like you know what this man's got in

the way he responds to treatment. Also, sometimes means a determining of what you think he's got; so that a physician is not a super-human person who if you tell him a little story and give him a chance to touch you, he comes up with a diagnosis—only a fool would think that you could do that, a doctor can't do that. After a long period of time, maybe you get an awareness of what you think this man has got. I treated Pedro for a considerable period of time in which we treated him primarily with some deep heat and muscle stimulation using the medcosonalator and some diathermy to the area where he [fol. 49] complained the most. The x-rays did not show me a great deal that I could figure that I had a proper diagnosis made. Also, my conversation on the telephone with Dr. Munslow was not very productive—he didn't tell me very much. Quite often, and it's understandable, quite often on the phone a man may be busy, you catch him during an examination and he wants to satisfy you in the shortest possible time. So our conversation did not add a great deal to my understanding of the problem, so I had to continue to see him over a good period of time. During all this time that he kept coming in and I kept treating him, he never changed his story one bit. I forgot how many times I've seen him, some thirty times or so—always the same complaint, low back pain, inability to stand for long periods of time, unable to sit for prolonged periods of time, swelling of his feet, his complaint of pain in the low back which radiated down to numbness in the left buttocks, and then pain down the left extremity. My impression at this time was not the first day but slowly over a period of time—my impression began to center on the possibility that he had a severe back sprain in the lumbo-sacral spine with possibly a ruptured disc in this area. Now I know Dr. Munslow had worked him up as he had entertained himself with the possibility of a ruptured disc. We did an x-ray which revealed some contrast material which was instilled in the spinal cord which indicated a myelogram had been taken somewhere in the past. It indicates somebody else besides me had also entertained the thought of ruptured disc.

Examiner: In the records you have seen, is there any report of myelogram having been taken?

[fol. 50] A. I think Dr. Munslow said something there about a myelograph. Now in my own x-ray which I took the 24th of April by Dr. A. Thaggard, he says, the lumbosacral spine examination 10 days ago, no appreciable change. Again no definite well localized significant appearing bone or joint abnormality was found. However, there are old laminectomy defects of L-4-5 and S-1 and a moderate amount of opaque material remains in the spinal canal from previous myelography. So from this you have to assume from interpretation of the x-rays that a myelograph had been done, and you don't do it unless you very strongly suspect a ruptured disc. This is not a procedure which is done lightly; it's a serious operative procedure; it has consequences which sometimes one doesn't anticipate and there is no physician which would undertake to do such an examination lightly.

Examiner: That's why I'm asking you. I want to find out if a myelogram was performed, I think it's quite important. Counsel, I think you are probably in the best position to furnish that evidence, even though we don't have it here today I will certainly give you an opportunity in the next two or three weeks—

Attorney: Here is a repeat myelogram, sir, so obviously it was the second one.

Examiner: Well—oh, this report—that's exhibit 10d.

Dr. Morales: This is interpreted by Dr. O'Neill as a repeat myelogram, and again it shows—demonstrates most of the previously injected Pantopaque to be in the subdural space in the lumbar region. So there is a definite indication that even prior to this one there had already been one.

[fol. 51] Examiner: What are the findings based on that myelogram—are they stated?

Doctor: The irregularity in the contour of the opaque media, have little or no significance because of the fact most of this opaque media is in the subdural or epidural space. The possibility of arachnoiditis must be considered.

Examiner: What's arachnoiditis?

A. The immediate covering of the spinal cord membrane has a very fine mesh of blood vessels and capillaries which is called the arachnoid, and an inflammation of this would give you arachnoiditis or inflammation of this fine cover which could be precipitated by either bacteria or a chemical irritation. Might have been a chemical irritation he's talking about but at any rate, could I continue—I think we're just wasting time discussing this, here. I am a family physician and see somewhere between 800 or better than 800 patients per month. A good number of these patients are laborers who have hurt themselves or have genuine complaints and some are phony complaints, and I am so busy that I can't waste my time on a malingerer or someone that's just using me for his own means, so, quickly, I try to discover if a man is sincere and legitimate when he has a complaint of long standing like this, and if I find that he's just using me and taking up my time, I try to get rid of him. Now at no time have I been impressed that I did not have genuine complaints here.

Now I'd like to add another thing as to how I arrive at what I think I know about this man. It's a matter of professional judgment. After he has been in practice for a good period of time he develops his judgment, and this is the only thing he can rely on sometimes in making a decision as to whether he should operate or not. [fol. 52] Quite often all of the studies are negative, yet the patient's condition may be such that you've got to operate no matter what the studies said because in your judgment there is something exists there which you cannot prove, and I have been in that position many times in which none of the studies have helped me. As you get more mature in this business you learn to depend more on your judgment and less on what the studies tell you.

Examiner: But as you operate, you become familiar and you find the definite symptoms—the source of the illness?

Doctor: That's correct. I want to give you one more phase here as to why I go on judgment quite often—all physicians go on judgment but you have more confidence

in your judgment after you've been through the mill awhile. For instance, in my own personal life, my wife and I were involved in an automobile accident seven years ago in which she had eleven bones broken. Among the fractures she had a broken hip which was pinned and everything looked just fine. So after a long period of time we found that it was no good and the hip had to be fused. After say six months or nine months, my wife still complained tremendously of pain and we took repeated x-rays by three of the best orthopedic men and everyone of the opinions was, "Well, my God, look at that. It's a perfectly fused him, that's a beautiful x-ray, perfect, that's a perfect job and there is no basis for pain". Yet, knowing the woman as a husband can know a wife, I knew that there was something wrong. We went back repeatedly to the orthopedic surgeon, he'd say, "Well, I'm sorry, that hip is good." I took her to another orthopedic man and he said there is nothing wrong with [fol. 53] that hip, that's a perfectly fine hip, and in exasperation I took her to a third orthopedic man and he said likewise, that there was nothing wrong with this hip. I was positive there had to be something wrong because I knew the person. So finally in desperation I took a movie of the hip with x-ray and it showed vaguely that there was movement but that was the only way we could begin to get them to listen to us, so finally we took her back to Galveston and at my insistence, Dr. Ainsworth operated on her and he came out and said, "Doctor, you were right, that hip was not fused and I was the last person in the world to believe it couldn't possibly be fused with those x-rays". So, he re-fused it. So here you have a professional opinion of what I consider three of the most reliable orthopedic men that I knew, and they were misled by the objective findings which we found, and in my judgment there was no fusion. So what I am trying to do here is show you why I have confidence in my judgment; that I try to listen to the patient, and from my own personal problems at home I have become sympathetic with patients and I sit down and take the time to listen. Only by listening can—sometimes you can learn something by what the man is trying to tell you.

Now getting back here to Mr. Perales. The fact that we have here, first, in the beginning a reputable man, Dr. Munslow, very plainly suspected there might be a ruptured disc here. He does his studies and then he does his laminagraphy, and then he goes in and does some surgery, and in his opinion he did what he thought was ample to correct whatever was wrong with this man. The fact that the man didn't recover does not mean that Dr. Munslow didn't know what he was doing or that he didn't do a good job any more than it meant that Dr. Ainsworth knew what he was doing and didn't do a good [fol. 54] job when he fused my wife's hip for the first time. A man may go in and do the very best he can, but when you are in such a sensitive area as this you don't dig around and see what else you can find. If you find what you think can answer the problem in your mind, you satisfy yourself because this is an extremely dangerous area to be digging around. So the fact that a partial laminectomy was done doesn't mean at all in my mind that all of these problems were taken care of right there. And in all due fairness to Dr. Munslow, I think he possibly corrected what he saw, skillfully, and any other man would have done exactly what he did, but I think there is still some pathology present in that region.

Examiner: What is the basis for your conclusion that there is pathology present—is it the symptomatology and complaints of the person?

A. That's right, the symptomatology and what I feel about the patient. I feel that he is sincere in his complaints and I am no fool. I try to sometimes lead them in conversation to see if I can trip them or if there is something that will give me a suspicion that he really wasn't telling me the truth and in the beginning I do this with all patients and I did it with him, and nowhere at any time have I thought he has been lying to me, and I sincerely feel there is something there that I can't put my finger on, and Dr. Munslow has not put his finger on it, but I can't prove it to you.

Examiner: Do you think that further surgery would be possibly beneficial in this case as in the case of your wife? I understand there was a discussion of surgery.

[fol. 55] Doctor: At my insistence, in spite of the misgivings of the orthopedic men.

Examiner: In this case, do you think further surgery is indicated either to explore or to implore remedies?

A. I think a further attempt by an orthopedic man might prove beneficial but here's the problem that you've got—it's always easier for somebody like me to make suggestions but you've got a problem here. First, you've got Dr. Munslow who did the original work; he has not seen the patient in years or since he discharged him and saw him last. It is difficult to feel that he would get himself so enthusiastic over finding something that he hasn't already found that he would want to do any further surgery. So you say, all right, if he doesn't want to go into surgery what else do you suggest. Well, there's too many orthopedic men who would not want to do surgery when the man who did the original surgery is still in town because this is not an area where you would want to get into unless you absolutely have to, and if there is a problem that exists here, you prefer to send him back and see the man who did the first surgery.

Examiner: In the case of your wife, you made some studies where objective findings were not indicated for further surgery. Now do you have any comparable studies or indications in this case that would indicate surgery might be beneficial?

Doctor: No, sir, I don't have anything very specific. There is further myelography could be done, perhaps a discograph could be done that would be helpful. Then it, like I said, again, is a hazardous procedure that has to be justified in the mind of the man who does it.

[fol. 56] Examiner: I'm sure you are familiar with testing provided by electromyography?

A. Yes.

Q. Have you seen the report of the electromyograph in this case?

Examiner: That's exhibit 18a, b, and c—the report of the electromyograph.

Dr. Morales: Mr. Buldain—

Examiner: Just a second, doctor, I want to get this report of Dr. Richard H. Mattson. Apparently he per-

formed the electromyographic study and Dr. Langston took the report and gave his interpretation. I see—Dr. Mattson, his impression. I'd like to have a copy of Dr. Mattson's report in the record—do you have another copy?

Attorney: No, that's the only one I have.

Examiner: This will be exhibit No. 20. Doctor, would you also not only look at Dr. Mattson's but Dr. Langston's?

Doctor: Yes. Dr. Langston is going on the interpretation of the report given by Dr. Mattson but we can only use Dr. Mattson's report like we use a report of an x-ray taken. Now because an x-ray doesn't show something doesn't mean that absolutely there is nothing there—because electromyography here does not show a great deal does not mean absolutely there is nothing there. We cannot allow ourselves to be in the position that with those 60 minutes Dr. Mattson worked with the patient that he is in a better position than we are to assume that there is or is nothing wrong with the patient, from the results of a study which can be interpreted and quite differently by different interpreters.

[fol. 57] Examiner: Well, you see, doctor, this is my dilemma—I follow your rationale and in many respects it's quite sensible. On the other hand, I've got the proposition—the law states that there be a medically determinable impairment. We have to have something on which we come up with a conclusion this man is hurting.

Dr. Morales: Now the medically determinable, you also have to include there the credibility of my conversation with you and you will have to weigh my judgment, and you will have to say, well, either I impress you with my judgment or I don't.

Examiner: No, doctor, let me point this out. I don't believe it's your credibility that's an issue. We have the problem—you are passing on the credibility of the patient.

Dr. Morales: What we are trying to determine here is medically determinable. You cannot just rely on studies that say—well, if you don't have a piece of paper

graphically to show that, then you have proved nothing. You can't allow yourself to fall in that pitfall because—

Examiner: Then we are faced with the proposition that if a doctor says, I believe this man is sick, I can't prove it but I believe he's sick, then to that interpretation we would be bound to say the man is entitled to relief, because I am sure many doctors feel there is something wrong with a patient but they just can't determine what it is. So this is the serious problem we have.

Dr. Morales: Allright. This is what makes your job difficult because very often I have been in this position—and any physician or surgeon that you know of which you will ask, have found themselves in a position when he's operated in the face of completely negative findings only to find that his judgment was correct and he was [fol. 58] vindicated by what he found once he got there, and had he just sat back and said, well, I'm sorry, you cannot operate because you can prove nothing, course nothing would be done. So that quite often the very truth of the matter lies in the judgment of the physician regardless of what your law says. If you're going to have to depend only on what your eyes can see, then you are going to come up many, many times with erroneous conclusions because I would be in that position frequently today, right now, at the hospital, if I didn't just follow what I feel is the correct diagnosis and your studies do not always indicate everything. And then, too, here is something I'd like to say, perhaps even off the record.

Examiner: No—

Attorney: No, keep it on the record.

Doctor: All right. Lay people quite often accept what they understand about studies as absolute gospel—gospel like infallible. Many people—like in x-rays, many people feel x-rays are completely infallible and we know that's wrong. Many people feel a poor electrocardiographic examination is absolutely—is absolutely diagnostic of what the patient has and that's erroneous. I have seen innumerable qualified instructors in cardiology who differed in interpretations of the diagnosis interpreted off of their electrocardiogram, so that in essence the weakness of many of our studies is the misinterpretation that

you could have had from one particular individual, but once it gets put on a piece of paper it becomes the absolute truth.

Examiner: Well, doctor, in this case we have had motion studies, we have had myelograph, we've had x-rays, we have electromyograph, and from my limited observation this morning—this is not a conclusion because I'll have to study the record—there is an indication that all of these studies indicate negative findings.

[fol. 59] Doctor: No.

Examiner: Will you correct me?

Dr. Morales: Well, no, because you have seen there are some positive findings.

Examiner: Well, I mean to say significant findings—electromyograph study, etc—they are significant I understand.

Dr. Morales: I don't know that you can take that supposition.

Examiner: Will you state it as you see it, then?

Dr. Morales: Dr. Mattson states, for instance, polyphasic units seen in the distribution of L-4 and/or L-5 roots that suggest old or chronic disturbance. There is no evidence of fibrillations or decreased number of units that would suggest any active process affecting the nerves at present. So right there you see the man says there is something there. (Note: Dr. Morales was quoting from exhibit 20). He does not elaborate because it is not possible to elaborate, but he has been fair enough to show that there is something there in the distribution of L-4 and L-5 that does suggest an old and chronic disturbance, meaning that this is not a new disturbance but a disturbance that's been there for a long time. Now there are some disturbances that you recognize that couldn't possibly have been there for a long time—they are brand new, they are acute, but he saw nothing that was recent. He saw only the disturbances that were old and chronic.

Examiner: Well, he said, suggest.

A. Suggest, that's right.

Examiner: Well, you take that with the other tests—

[fol. 60] Dr. Morales: Then you have another test

that tells you the very fact that Dr. Munslow operated and the very fact that he did a laminectomy.

Examiner: There's no question but that he had nerve root involvement at one time—there's no question about that. The problem is following that, and does he have a medical condition which prevents him from engaging in substantial gainful activity, and it's these tests I'm talking about following the operation—I'd like to get your interpretation, now.

A. My feeling is that he still has some nerve root compression which was not corrected by surgery, and I feel that at the present time his condition is a permanent condition, and, in the absence of any further surgery—

Examiner: You think any—you think further surgery is indicated in this case?

A. I do, yes.

Examiner: That's one thing that is very important. What would be the nature of the surgery?

Doctor: That's not up to me to determine.

Examiner: If you were to be asked, you're the family physician, you've seen him a long time, you've made your examination, you've seen these other reports, you've stated that you think further surgery is indicated, I'm asking you if Mr. Perales should ask you now—and I say I'm asking you for him, Doctor, what type of surgery would you recommend in this case—

A. I would have to tell him this. I would have to say, Pedro, I don't know. I would have to send you back to either Dr. Munslow or another neurosurgeon who would do further examinations to further determine exactly where the problem was and the nature of the problem, but I do think the medication and the treatment such as [fol. 61] we have given you is not sufficient to get you well and I don't know anything else that will get you well short of surgery but I can't tell you what type of surgery; that would be up to a neurosurgeon to decide—that's my honest opinion.

Examiner: All right, that's fair.

Attorney: I think there is a positive finding in that x-ray report.

Dr. Morales: It says there is an old laminectomy de-

fect of L-4 L-5 and S-1 and a moderate amount of opaque material remains in spinal canal from prior myelogram. It just shows that surgery has been performed in this region—the evidence is there. May I ask you a question.

Examiner: Sure.

Dr. Morales: Your job is to determine whether or not he has a compensable disability, is that it?

Examiner: Well, that's the general issue. I have to make specific findings. I know you've been studying the records. I have to find out the particular diagnosis based on the medical evidence—what is wrong; and the degree of severity; I have to determine the medical evidence that supports the diagnosis; I need clinical and pathological objective findings of the physician to support the diagnosis of the impairment. There are other things that go with it—the vocational ability which is not in your sphere, I don't need to necessarily trouble you with that. I might like to say this, counsel. This problem of objective clinical and pathological findings versus the honest opinion of a family physician that can't put his finger on a particular thing to support his diagnosis, but there is pain in the area and inability to function there—this has been [fol. 62] a matter of consideration by several district courts. I would suggest that you research this problem and submit a brief later, and you will find—I think you'll find a general consensus that most courts agree although there are some courts that take exception to the view that Dr. Morales has expressed this morning. I'm going to have to pass on it—I can't escape it, and a brief as I just suggested—your study would be of assistance, so I would like to solicit your brief along these lines. Do you have anything further you want to ask the doctor?

Attorney: Yes. Dr. Langston, on the basis of one report, one examination, says—and it doesn't say how long the examination was, he was impressed by the obvious attempt of the patient to exaggerate by just standing there and not moving, not even the uninvolved upper extremities, he has a psychological overlay to this illness and it is suggested that he be seen by a psychiatrist. Based on the numerous times all told since April 13th,

that you have seen him, do you agree with Dr. Langston or disagree, and could you tell us why?

A. I disagree with him completely.

Attorney: Could you tell us why?

A. You have to know the man.

Examiner: Let me say this, I think we can save a little time. Following this, there was a psychiatric evaluation and as far as I am concerned there is not sufficient evidence in the record here to indicate a psychoneurotic condition and we can disregard that. I know what Dr. Morales is going to say.

[fol. 63] Doctor: In my opinion, there is no psychoneurotic, neither is there any psychiatric—

Examiner: That is sufficient.

Attorney: In your opinion, in the time you saw Mr. Perales, did he attempt to exaggerate his condition or not?

A. No.

Q. Dr. Langston also says his reach and grasp are very limited but intentionally so. Doctor, really is it possible to tell?

A. I think that is a completely insignificant observation and has no bearing on the real problem.

Examiner: What was that the doctor said?

Attorney: The doctor stated his reach and grasp are very limited but intentionally so.

Doctor: I think I have a little story that will be very significant to you, Mr. Buldain.

Examiner: Just exactly why is that—his upper extremities though they are completely uninvolved by his injury, he holds very rigidly?

(Note: Dr. Morales proceeded to read from report)

Examiner: I think we ought to read all the paragraph and not just take one sentence out. So, doctor, I think you better read the paragraph as a whole before you come along to that one sentence. Start here with the examination.

Doctor: Read it out loud?

Examiner: No, it's not necessary.

[fol. 64] Dr. Morales: I found all of this to be true of things he cannot do and the way he moves, too, but my interpretation of them would not be the same as the interpretation of Dr. Langston. For instance, one part—his reach and grasp was intentionally limited—in other words, taking Mr. Perales' whole attitude and response, I would like to tell you one story which I think will help you interpret what some of these men have found, and then I'm forced to use words here which I hate.

Examiner: That's all right, we're used to these things.

Dr. Morales: I hate to make a reference to a person being Anglo or Latin but it clears the air and you know what we're talking about.

Examiner: Well, doctor, my father was a Basque, and I will explain to the claimant in Spanish when the doctor is finished as I speak Spanish so you go ahead and speak freely.

Doctor: Pedro has an intense distrust of Anglos and his whole attitude reflects it immediately. I pursued this one day and I asked him one day about his childhood and he told me a story that's very significant. I'm sure he won't mind my relating it now, but at one time he was asked by a bunch of Anglos close by what his religion was. Well, he was limited in his vocabulary and he knew the word he wanted to use but he was unsure about the word, and in the confusion he used the wrong word, so he blurted out "cadillac", and everybody had a big laugh and said, "No, stupid, the word is catholic, not cadillac." This hurt him deeply, you know, and ever since then he has disliked the English language and he does not trust Anglos too well. Besides, other things that have happened to him in the past; and in this person here you have a problem which a great many of the economic injustices which he feels, and other things, have caused him [fol. 65] to be extremely doubtful about Anglos that he comes into contact with, especially as it relates to his illness and almost from the instant he walks in, he walks in with the attitude that is bound to be misinterpreted by the person who sees him.

Examiner: In other words, you think his behavior

and attitude when he talks to people, that his reaction is such that they have misinterpreted?

A. Misinterpreted and I don't know what value you want to put on that, but I think he's been evaluated properly. Probably even Munslow even rubbed him the wrong way.

Examiner: Anything further?

Attorney: I have nothing further from the doctor.

Examiner: Well, doctor, I wish you could stay but I'm not going to insist on it. I'm going to ask Pedro some questions. It would be interesting to get your observation on some of these things that I might ask, but I'll leave that up to you and counsel.

Dr. Morales: I'll stay another thrity minutes.

HEARING EXAMINER QUESTIONS THE CLAIMANT: (Claimant first duly sworn, testified:)

Examiner: In view of Dr. Morales' explanation of the antipathy of the claimant towards the Anglo people, I want to make a few preliminary remarks in Spanish so that he will understand that I understand his position and I'm going to try to state for the record what I say.

Examiner: I tried to explain to the claimant that I am familiar with the fact that at times the American or the English speaking people have taken advantage of the Mexicans, more often times referred to as Latin-American, and I am sympathetic with his position. I am going [fol. 66] to ask him some questions and they will be completely in a friendly manner. I do not intend to hurt him but there are some things I simply have to develop that I will have to ask him. If I ask him a question that appears to be hostile I hope he does not think that I am being unfriendly or hostile. Is that generally correct, doctor?

Dr. Morales: Yes.

Attorney: For the record, you might state for the record that he originally went to a Spanish speaking lawyer. I understood what you said. I'm not as fluent as you are but he was referred to a Spanish speaking lawyer.

Examiner: Mr. Perales, how old are you?

A. I'll be 35 the 30th of this month.

Q. You are still a young man, aren't you? I'd like to be that age. And you are married?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir—three.

Q. What are their ages?

A. The oldest one is 13 this past year, the next one is 12, and my daughter is 10.

Q. They are all in school now?

A. Yes, sir.

Q. You live in your own home?

A. No, sir.

Q. You are renting?

A. I am renting.

[fol. 67] Q. What size house do you live in?

A. It's a small four room house.

Q. What's your monthly rent?

A. It was 50 but they reduced it to $45.

Q. You still live as a family group—you and your wife and three children in this four room house?

A. Yes, sir.

Q. Tell me what time do you get up in the morning, what time do you usually wake up in the morning?

A. I generally fall asleep around 3:30 to 4:00, in the morning, wake up about 30 minutes later and fall asleep again.

Q. What happens at 3:30 in the morning?

A. I go to sleep at that time.

Q. You go to sleep at 3:30 in the morning?

A. Yes, sir, 3:00 to 3:30—I mean I'm in bed but I can't sleep at night.

Examiner: I want to start out from the time you wake up, but you go to sleep about 3:30 in the morning and how late do you sleep then?

A. I sleep about an hour or two hours and wake up.

Q. Around 4:30 or 5:30?

A. I'd say about 6:30.

Q. Between 3:30 and 6:30, do you sleep pretty well—do you?

A. Well, I toss around.
Q. But you do get rest during those hours?
A. Yes, sir.
[fol. 68] Q. And you're able to dress yourself in the morning?
A. Well, except for my shoes and socks. My kids have to help me put my shoes and socks on.
Q. Who helps you?
A. My kids.
Q. Your children help you with your shoes and socks. What time do you have breakfast, about?
A. I don't have no breakfast—a cup of coffee.
Q. Your wife fixes the coffee?
A. She gets up and fixes coffee.
Q. Does your wife work?
A. Yes, sir.
Q. Where does she work?
A. She works at—I don't know how to pronounce it, it's a Spanish name. It's Siguera Drug Store.
Q. Does she ever fix you any toast or bread or anything like that?
A. No, sir.
Q. You just have a cup of coffee?
A. I just have a cup of coffee.
Q. What time does she leave for work?
A. About 7:30.
Q. What do you do after she leaves home?
A. I get up and sit around, smoke cigarettes, and go back to bed a little while, about 30 minutes or an hour. I sleep about 3 or 4 hours during the day.
Q. During the day—3 or 4 hours. What about lunch?
[fol. 69] A. I don't eat.
Q. You don't eat anything at all?
A. I have to wait for my wife to come back.
Q. What time does she get home?
A. She gets off at 6:30 and gets home about seven.
Q. So except for a cup of coffee in the morning, you have nothing to eat until your supper?
A. That's right.
Q. What does your supper usually consist of?

A. Sometimes consist of a sandwich—cheese sandwich, and maybe sometimes beans or eggs, something like that.

Q. How tall are you?

A. The last time I was measured was about 5′ 10″.

Q. You are fairly—you look fairly well proportioned, physically. What do you weigh, about?

A. About 215 or 220.

Q. What do you do during the day while your wife is gone? You mentioned you sleep three or four hours a day. What else do you do?

A. I have to lay in bed most of the time because I can't sit for too long at home. I can't sit in the chair too long. I have to be in bed. In the mornings when she goes to work I get out and walk. It's a four block where I live and I walk around the block and it's four blocks.

Q. You walk four blocks?

A. Yes.

[fol. 70] Q. You take your cane with you, do you—you walk with your cane?

A. Yes, sir.

Q. About how long does this walk take?

A. It takes me about 30 minutes cause I stop by—

Q. You do what?

A. Look at cars at the car lot there.

Q. You have friends in there?

A. No.

Q. You and your wife have friends around the neighborhood there that you visit with sometimes?

A. Just the next door neighbors. She works, you know, and she talks to my wife.

Q. Do you ever go to the grocery store to buy a loaf of bread or something so that your wife won't have to buy it when she comes home?

A. My kids, they go.

Q. Oh, the children, they do that for you?

A. When they come home from school.

Q. What time do they get home from school?

A. About quarter to four.

Q. You're up and around usually by then?

A. No, I'm usually in bed by that time.

Q. What time do you go to bed in the afternoon to rest?

A. I go to bed about 2:30.

Q. And you get up about what time?

A. About 3:30.

[fol. 71] Q. You have a small yard around your house?

A. It's small, yes.

Q. Any grass there?

A. It's all dried up.

Q. Any flower beds there?

A. There were some flower beds there, but no one there to take care of them.

Q. Do you and your wife have a car?

A. Yes.

Q. What kind do you have?

A. It's a '55 Oldsmobile.

Q. You don't drive it, do you?

A. No, not often. I drive it once when I had to go to doctor or something I have my brother-in-law take me or drive me downtown—sometime I take a chance and drive it.

Q. But you don't drive it yourself at all?

A. No, sir.

Attorney: I think he said sometimes he takes a chance.

Claimant: I take a chance like, you know, after the traffic's gone like if I have to go to Mr. Tinsman's office; it's not too far from where I live.

Q. But you do drive that short distance?

A. Yes, sir.

Q. Does this have an automatic gear shift?

A. It's automatic.

[fol. 72] Q. Power brakes?

A. Power brakes.

Q. Power steering?

A. No, sir.

Q. But you can handle the steering allright?

A. Yes, sir.

Q. About how long a period of time can you drive a car before it becomes uncomfortable?

A. Well, I drove a car one time for 65 miles and I couldn't control it.

Q. Where did you drive?

A. From Corpus Christi to San Antonio—I drove 65 miles from Corpus Christi to here.

Q. When was that?

A. Back in February.

Q. February of '66?

A. Yes, sir.

Q. Was your wife with you?

A. No, I was with Jim Walter Corporation, I was going back to work as salesman.

Q. What kind of work?

A. Was going to be a travelling salesman.

Q. Selling what?

A. Houses.

Q. What?

A. Houses.

Q. Houses, real estate—they build and sell and at that [fol. 73] time you were thinking about being a salesman?

Attorney: This is the company he worked for when he was injured, see.

Examiner: Yes, but the work would not be actually—

Claimant: I couldn't go back as a truck driver anymore.

Q. But you had in mind at that time going in selling?

A. As commission selling.

Q. Did you try at all to sell?

A. At the time I came from Corpus I found I couldn't control the car on the highway but the next day I noticed I was getting swelling and I called Dr. Munslow.

Q. Where were you getting swollen?

A. My feet, my hands, my arms got numb, my fingers got numb, I called Dr. Munslow and he kept putting me off for awhile so finally I got to see him and he just told me he didn't know what was causing all that.

Q. When did you last see Dr. Munslow?

A. I believe it was in February or March.

Q. And from there, you went to see Dr. Morales?

A. In April.

Q. Since the trip to Corpus, have you tried selling any houses?

A. No, sir.

Q. Now I'm going to ask you a question and I don't want you to get mad or suspicious of me as you may have an explanation. You tell me that you have a cup of coffee for breakfast and you have nothing more until supper when you have a light sandwich or a light meal. [fol. 74] You appear to be well built and husky—210 pounds. Is that enough food to keep you in shape—in the shape you are in, or do you have other food?

A. That's all the food that I eat. As far as my weight, I wake up in the morning and I can see my belt but after I drink a cup of coffee my stomach gets big.

Q. You have gas?

A. I don't know.

Q. Do you feel bloated?

A. Feels big, that's all, but in the morning when I get up I can feel my stomach down there and I can see my belt but after I drink my cup of coffee after awhile it—I walk around and my stomach gets big. Sometimes it gets bigger than what it is right now.

Q. What about after supper? Does it feel big after supper?

A. Yes, sir.

Q. You take any medicine for that—that feeling?

A. Well, I took some, I don't know what you call it, it's a little bottle Dr. Morales gave me for gas.

Examiner: Doctor, would you recall what that was?

Dr. Morales: Yes, it's an antacid. I might maybe save you a little time here. Going back to his sleep disturbance—

Examiner: That's all right, I'm going to get to that some more.

Doctor: I think I can explain that to you and as far as eating—

Examiner: That's all right. All I want right now is the nature of his medication. It was an antacid? [fol. 75] A. (Doctor) It was an antacid that he was taking.

Examiner: Have you taken anything else besides this medicine—this little bottle that Dr. Morales gave you?

A. I take alka-seltzer.

Q. Do you have a television at home?

A. Yes, sir.

Q. You watch that during the day?

A. I watch it from about 10:30 to 12:00—correction—until 11:30.

Q. At night?

A. No, during the day.

Q. Oh, during the day from 11:30 until 12:30?

A. Yes.

Q. You may watch it once in awhile but as a rule you don't do it—is that right?

A. I watch it in the evening with my kids because the television's in their room and they have to go to bed early and I watch it until about 8:30 or 9:00 at night.

Q. You watch it sitting in a chair do you?

A. Well, I sit in a chair and then, you know, I get up and have to stand up awhile. I don't just sit there and watch television more than a couple of hours.

Q. What time do you go to bed?

A. I go to bed about 11:00.

Q. Between 8:30 and 9:00 you turn your television off, and 11:00 you go to bed. What do you do in there—

A. I sit and talk to my wife. She stays up until 11:00 or 11:30 ironing clothes; after she comes from work she washes clothes and then she irons.

[fol. 76] Q. Are you able to do anything around the house to help her?

A. No—no, sir.

Q. No dusting?

A. No, sir.

Q. No sweeping?

A. No.

Q. Ever help her with the clothes in any way?

A. No.

Q. You go to bed about 11:00—what happens then?

A. I lay in bed, I smoke while I'm in bed and I lay there, I go to sleep, you know.

Q. When do you go to sleep, about?

A. I'd say around 3:00 in the morning.

Q. Now between 11:00 and 3:00 in the morning, about 4 hours that you don't sleep, why can't you sleep?

A. If—well see if I lay too much on my back it gives me trouble.

Q. What kind of trouble?

A. I feel real stiff from my neck on down.

Q. From your neck down to the bottom of your buttocks you feel stiff there?

A. Yes.

Q. What else do you feel?

A. I have pain—I take medication.

Q. Where do you feel the pain?

[fol. 77] A. Feel it in my back.

Q. You're pointing to your right rear side just about even with the hip—is that right?

A. Yes, sir.

Q. That's the right side you feel this pain?

A. I feel my pain right in the back.

Q. Oh, right in the middle of the back just a little below the waist?

Claimant: Right from the very bottom.

Q. From the tail bone?

A. Yes, to about half ways.

Q. Half-way up your back?

A. Yes.

Q. You feel pain around that area?

A. Yes.

Q. What else do you feel besides that?

A. I feel depression in my neck.

Q. What side do you feel that depression?

A. It's right here.

Q. Right in the middle—just below the neck or right up above it?

A. Just below the neck right at my shoulders there. I feel something like very heavy—

Q. Pressure there?

A. Pressure, yes, sir.

[fol. 78] Q. What else do you feel besides that?

A. I have headaches.

Q. Do you take aspirin or things like that?

A. Well, I take some compound that Dr. Morales gave me.

Q. For your headache?

A. Yes, sir.

Q. What else do you feel besides pain in your back and pressure in your neck—what else do you feel—anything else?

A. Well, nothing else, only that I'm not comfortable.

Q. What happens if you turn over say on the right side—do you feel relieved?

A. A little bit but after awhile on this side, I feel pain.

Q. You are now moving—the pain moves from your right hip going down your leg—how far does that pain go?

A. Down to the kneecap.

Q. What kind of a feeling is that?

A. Just sharp pain.

Q. Do you have any pain like that on the left side?

A. Yes, sir.

Q. On the left leg, too, huh?

A. Yes, sir.

Q. Does one side feel more than the other?

A. Well, it's, I mean, it varies—just about the same.

Q. Do they both vary at the same time?

A. Sometimes.

[fol. 79] Q. What about below the knee?

A. No, I don't feel anything below the knee.

Q. You can wiggle your toes all right, then, can you?

A. Well, I never tried.

Q. You never tried wiggling your toes? Can you do —can you close your toes back in a claw-like manner?

A. Well, when they ask me to do it I try to do it, but they just grab and push them down and pull them out. I try to get them, to raise them up or go down.

Q. Do you know what a "charley horse" is—a knot in the muscle, kind of a bump?

A. Like a cramp sometimes?

Q. A cramp that a knot swells up in the muscle maybe of your leg—have you ever had that in your leg?

A. No, sir.

Q. You lie on your stomach any, sometimes?

A. Well, I try to lay on the stomach but right here on my back, it goes down—

Q. In the middle of your back—it goes down?

A. Yes, sir.

Q. What happens?

A. It hurts more.

Q. It hurts more?

A. Yes, when I lay on my stomach. I have to get away from that.

[fol. 80] Examiner: Doctor, you've heard my line of questioning. I am sure you appreciate why I ask these questions. Would you like to make any comment now—you want to ask any questions yourself?

Dr. Morales: Yes. He has a very disrupted sleep pattern; he gets enough rest—I have given him continuously, since I have seen and known him, sleeping compounds and I've had to switch from one to the other, to the other, to the other, because after awhile what I give him no longer works, and I've gone through the whole thing but I've kept him off of barbiturates because I was afraid.

Q. Have you given him muscle relaxants?

A. Constantly, and at present time he has exhausted all muscle relaxants to where we have to—where now we have to use muscle relaxants combined with codeine, and he depends almost too much on it now, and I'm thinking of making a change. He uses anywhere from 4 to 6 tablets a day of muscle relaxant with codeine in it, and then he's been on Thorazine and Paveril for sleep and every now and then he complains that it no longer helps him. He's wanting to take more and I challenge him and I ask him why he started using his pills up so fast, and he gives a complaint that it don't help so he gets up and takes two or gets up in the middle of the night and takes another one.

Examiner: Have you prescribed Valium?

A. Oh, yes.

Q. And Mellaril?

A. Mellaril—we've gone through the whole—

Q. They don't help any more?

[fol. 81] A. Yes, they have helped. As a matter of fact, to start off with early in the game we were giving him Tuinal and Mellaril. That was helping. Then after a period of time we switched to Darvon and we've used such things as Aventyl and Elavil. He also had a depression with this too that was mild—he was despondent because of lack of any progress.

Q. Why the changing from one relaxant to the other?

A. After awhile, well, he would have the same old complaint and we were constantly striving for better results. If I see the man is taking one drug and he still complains, I feel maybe a different brand would give us better results.

Q. There's been no side effects?

A. That's right.

Q. And nothing to indicate—

A. Medication with him gives him temporary systematic relief and after a period of say six weeks—eight weeks, he becomes refractory and requiring larger doses and rather than go to larger doses I just switch to a different type of medication, and we've gone through many different types of regimes which give only just temporary relief.

Q. What about heat therapy—does he get any relief from that?

A. We have exhausted that. We've done heat therapy, muscle stimulation, diathermy, ultra-sound.

Q. Doctor, I am puzzled at the small food intake and what appears to be—he is what appears to be a heavy barrelled—

Dr. Morales: It is a very curious thing and I'm hoping maybe to give you some of my views. I have a large [fol. 82] number of people who want to reduce and I put them on a diet and appetite depressant and a month later they come in and haven't lost a pound, and they tell me, doctor, I swear to you, My God, I'm not eating a thing. I don't eat a single thing, I drink only coffee and a piece of bread at meals, and true, that's all they do eat for maybe a couple of days but then there is one day—where one day they really stack up, and if you take the time to question them, you know, you'll find

that their impression is because a part—or part of the days they eat very little but they forget many other times when they really packed it away. And then, too, you take a man who sits around—a man who sits around and does nothing but look at TV everyday and does nothing does not require a great deal of calories to just maintain the weight that he originally had, so you haven't— we haven't had a problem here of trying to reduce him. I would hope that he would reduce. I would think it would help him, but I think he eats enough daily to take care of the calories that he does by just existing.

Examiner: Also, there's another thing that puzzles me is the matter of the pressure in the cervical area of the spine. Had you heard this complaint before?

A. As a matter of fact it's been a constant complaint with him. It's a minor complaint in relation—in comparison to the complaint to the back but he has had a constant complaint of the neck.

Examiner: Have you performed tests on that area?

[fol. 83] A. I have never been too impressed with his complaints about the neck. They are always there along with the headaches and generalized weak feeling that he has, but I thought I could explain satisfactory without attributing anything real serious to it.

Q. There's no evidence of an injury to the cervical vertebrae?

Doctor: I don't recollect. I may have done it in the hospital—I don't have a report here to show it but like I said before, I have never been too impressed with the complaint of the neck. I think he has got a dozen complaints that if you tried to follow each one through—

Examiner: What are some of the other complaints?

A. He complains of insomnia, nervousness, tension, anxiety, headaches, dizziness, neckache here; I've seen him depressed sometimes and upset with me, irritable, grouchy.

Examiner: Well, doctor, I'm not a neurologist or psychologist, or psychiatrist, but you know after awhile some of this kind of rubs off. Aren't these symptoms you are describing—couldn't they be psychosomatic?

A. Absolutely; the headaches—that's precisely what I'm saying. I never paid a great deal of attention to the severity of the headache and neckache, but this is very understandable.

Examiner: Well, he's got these other symptoms too.

A. That's right but this all has nothing—this is an entirely unrelated thing—don't try to tie it in with the back.

Examiner: I'm not trying to but I have to get the total evaluation.

[fol. 84] Doctor: That's good.

Examiner: There's evidence here of possibility of further examination, with all of these symptoms which appear to be unrelated and from what he tells me here appear to contribute significantly to his discomfort.

Dr. Morales: No, sir, I think you have a tendency to be misled. You take any man who's just sitting around the house doing nothing, thinking, his wife comes home, he hasn't mentioned this but she resents having to go out to work; when she comes home she fusses with him, bickers with him; he does not have much at home, there is always tension between him and her—it's a marital thing here between him and her.

Examiner: Has there been an indication to you in this case that there has been such tension?

A. I know in my conversation with him and her that there is such tension. She was a woman that's ill prepared to work; that knowing there was no income somebody had to go to work so she went out to work and she resents that. She feels she ought to be home taking care of the house and the kids, and she works and when she comes home the house is all messed up, he has done nothing to help her, and there is a lot of bickering and a lot of tension between the two. His inability to respond to treatment also makes him very depressed and anxious and tense, and that alone will explain what he feels in the neck.

Examiner: But that contributes to his total impairment, does it not?

[fol. 85] Doctor: In a sense, yes. I think we are discussing here a side effect of the type that has resulted

from his primary disability in his back, and this is something which we see quite frequently in all men who are forced to sit home and just baby sit.

Examiner: Let me ask you this—in connection with the pain which he says goes from the low back down to the knees, is it a fairly prevalent condition that the pain does not go beyond the knees in such cases?

A. Not necessarily. When you have a pressure of the nerve and you have radiation of pain down into the lower extremity, there is very little rhyme and reason as to why one patient feels it up high and the next one will feel it low, and some feel it all the way down, and some complain of pain down close to the ankle.

Examiner: In other words, there's no significance?

A. There is no significance. The most frequent complaint is that it comes down to somewhere in the thigh and they could never tell you where. You tell them, well show it to me, and they say I don't know where it is. You know they have no tenderness; they can't make it worse by holding back; they feel it's there someplace, but they can't tell you where it is, and that's so typical of that. Quite often you have to sit—and sometimes I'll spend five minutes just to make sure the patient has understood what I'm asking because they can't tell me where the pain is. Sometimes they say, I can't explain it to you. So sometimes you are misled as to thinking where it is and if it's in the joint, above the joint, or below the joint, that's very important.

[fol. 86] Examiner: Doctor, anything you would like to ask Mr. Perales for my benefit to clear up any of these questions? I may not get the right idea. Maybe some medical authority might reach a conclusion. Is there anything here that needs some clarification? I'm just thinking out loud, to me. For example, there's a possibility, Counsel, that further psychiatric evaluation is indicated; for this reason—and I'm thinking out loud—I haven't made up my mind, I don't know what I'll decide when I read all this back—there's some indications here of psychoneurotic involvement. I have seen this before in cases, and I may want further development.

Attorney: Well, let me say this. It's been my experience in handling cases of this type, when you have a man who's been supporting his family and suddenly he's forced to depend upon his wife, and he feels dejected within himself, that this condition of depressions and tension brings on lot of other symptoms, but if you were able to get him back to work and somehow he was able to begin feeling he was the breadwinner of the family, he was the one his children had to look up to, these other symptoms would disappear.

Examiner: I'm not in a position to argue with you. What I think is we are—correction—I'm not in a contest to argue with you, and I am not competent in this field, but I think this situation should be cleared up.

Dr. Morales: Quite early in seeing Pedro Perales I became convinced in my mind that I had two things to treat. One—his primary condition of the back is my primary concern, and secondarily—he had this tension, [fol. 87] anxiety, nervousness, sleeplessness, that he developed as a result of his inability to get around because of the back. You cannot allow yourself to become distracted from the main complaint of what you're trying to do, with the patient misleading you, because they will sometimes occupy a greater portion of the patient's interview with you so that you have to be very careful not to allow yourself to put too much importance on these other complaints which by necessity have to be there.

Examiner: Well, doctor, let me point this out. I don't want to argue with you—I could smile here and you and I can go out the door and then I write a decision, but for your benefit I want to do the right thing. How can we say, in view—in light of objective medical clinical findings that this nerveroot—this nerveroot involvement in the back—how can we say that perhaps that condition there is not triggered by the same thing that is triggering the condition in the cervical area and these other symptoms that you have indicated—how do we know that?

A. That would be a very logical way of thinking, Mr. Buldain, providing your statement there was true. There are many objective findings, and I notice that you

continuously refer to the lack of any objective findings which is not true.

Examiner: But I say objective—I mean significant.

Dr. Morales: That is another objection I take with you.

Examiner: Well, will you do this for me, then. The objective clinical findings—will you review them?

[fol. 88] Doctor Morales: All right.

Examiner: Give me the objective significant—

Dr. Morales: On my x-rays taken April 24th, the x-ray shows that there is an old laminectomy defect at L-4 and 5, S-1.

Examiner: Now you say defect, what do you mean by defect—what is the nature of that defect?

Dr. Morales: There is portion of substance, be it bone, ligament, fatty tissue, whatever surrounded this area that is no longer there in that portion of the spine. There you have one very real objective finding which is very significant. The removal of this would only know whether this causes further compression in that same area.

Examiner: In other words, the removal of this sort of material itself can be pain producing?

A. I have known of cases like that, yes, sir, where the fact that you have weakened an area sometimes in itself may give you a result that you did not anticipate. You have a very definite and significant finding that there is a defect there.

Examiner: You state the absence of this material and being removed, in itself, can be pain producing?

Dr. Morales: No, sir, what I'm trying to show, there are bits of inflammation here which are very real. One —you have a defect from an old laminectomy in the area where he complains—

Q. When you use the word "defect"—I'll put that in quotations—is that defect a symptom which is producing the condition he complains of today?

[fol. 89] Doctor: The defect which is something of an abnormal finding in the body.

Examiner: But does that produce the condition we have today—is that conducive of the pain?

A. Well, you can't ask me that, Mr. Buldain.

Examiner: Well, I'm asking you as a doctor.

Doctor: No, you can't ask me that. I'm not God—you can't ask me that. I am only trying to point out to you there are many objective findings that are significant and then I'll leave them for your opinion.

Examiner: Maybe I should qualify significant in the sense that they produce the condition that he is in—when I say significant, I mean there is a cause in effect.

A. Well, let's say significant to the point it is possible they produce the condition.

Examiner: Give me those that are possible to produce this condition, and the laminectomy in itself, I'll just have to tell you, I'm not impressed because you've had a laminectomy that means that that causes a physical impairment today—it may or may not.

A. That's true. I'm merely saying there's findings there.

Examiner: Oh, there's findings of a laminectomy there, sure.

A. Because a laminectomy has been done, it's not possible that—

Examiner: That's right. I want the clinical symptomatology that shows today he has this condition and that's the significant item that I want.

[fol. 90] A. All I want to do right here is outline and restate for you some of the findings which I think are significant and which together you should appraise, not one by itself because neither one of these findings is in my opinion the only thing you should go by—you should go by the total picture.

Examiner: Sure.

Doctor: All right. Here you have on x-ray and in the reports—you have read this one from Dr. Munslow. One—just let me outline, give me a piece of paper. I'm going to have to leave after this. One—a myelograph was done. Now a doctor of the statute of Dr. Munslow would never first perform a myelograph capriciously—this is a serious procedure.

Examiner: I agree.

Doctor: So, if he did it, in his own mind already he had seen some sufficient symptoms to indicate a ruptured

disc or he never would have allowed himself to do the study in the first place. So this is very significant that a neurosurgeon had seen sufficient findings in his physical examination and treatment to have caused him to perform a myelography on a patient and then have caused him to repeat it—that is a very significant finding. Second—you had a left hemilaminectomy. The very fact that it has been performed indicates that there was a serious condition existing which prompted the physician to operate on this man in an area as sensitive and delicate as the spinal column is. A man would never go in there unless he was convinced in his own mind that there was something drastically wrong there.

Examiner: I appreciate that.

[fol. 91] Dr. Morales: O. K. In all fairness, Dr. Munslow was convinced that when he got in there, and what he saw, he did what there was to be done. There is no way of any of us knowing whether that was sufficient to have corrected the situation—it might have been insufficient, of which—the judgment at that time you couldn't tell, so that a fact that a laminectomy first had to be done indicates there was a good reason for it being done, but that does not mean that because it was done, the cause which prompted the laminectomy in the first place was removed by the laminectomy. In other words, the job may have been half done for all we know—we don't know—I just assume. This man has continued to complain that the procedure that was done was not sufficient, otherwise he would have been completely cured and he would not have had those complaints. That's the whole basis. I think that all of these other studies really are clouding of the issue more than they are cleaning up anything for us.

Examiner: Well, doctor, there were studies that indicated the need for the laminectomy.

A. Right.

Examiner: And clinical findings?

A. Right, or it never would have been done.

Examiner: Now do we have clinical findings?

A. All right. Since then we have very significant clinical findings as stated by Dr. Mattson. Here there

[fol. 92] was evidence in the motor units on voluntary effort and these were grouped—no, wait a minute, I'm sorry, I'm reading wrong—some polyphasic units are seen in the distribution of L-4 and L-5 roots that suggest some old or chronic disturbance. Now he is telling us here precisely what we know already. This is not a new condition, this is an old condition which we were testing.

Examiner: Is he saying—this one says this is an old condition but does he mean there that that is an impairment today—there is an indication of impairment today—is he saying that?

A. Precisely, that's what he's telling you there, and he goes on further on to tell you that there is no evidence of degrees of fibrillations or decreased number of units that would any active process effecting the nerves at present (sic, ex. No. 20), so that he is differentiating here between an active process, something old, but he's telling you there is something there that is not new, and that's what he's telling you. Then he also finds psychogenic or functional component that is also there, but we already see that from all these other things we know about. We expected that to be there by necessity, but by the fact and the very important thing you consider here is that he tells you there is present some old and chronic disturbance.

Examiner: Now, I gather from your interpretation that you made and that of Dr. Langston, I also gather you disagree with Dr. Langston?

A. I disagree. I don't think Dr. Langston had the time or opportunity to fully evaluate what he calls a very poor effort.

[fol. 93] Examiner: I may have to ask him to appear to explain that.

Attorney: I think it was also significant that this exhibit 20 was obtained from the Baptist Memorial Hospital and those others were obtained from Dr. Langston.

Examiner: No, the State Agency which administers this program requested that an electromyograph be performed. I requested that myself and then they in turn asked Dr. Langston to interpret that report.

Attorney: All I can say is exhibit 20 was not in your

records and I don't know whether Dr. Langston had the benefit of Dr. Mattson's report.

Examiner: I don't think Dr. Mattson would have made an interpretation out of thin air, and I know of no other electromyographic study.

Attorney: Oh, no, no—that's not what I'm saying. Dr. Langston had 18a and b, but whether he had exhibit 20, I don't know.

Examiner: Oh, oh—I may have to clear that up but here we have different medical testimony and I have to resolve that.

Dr. Morales: I think I'm going to have to go now, Mr. Buldain. I will put this for your consideration. This is a very most difficult case for evaluation and possibly what we need here is a couple of Solomons sitting down discussing it. The evaluation is difficult because, first off, the man who did the original work did not do all of the followups. Say, for instance, had I done this surgery, and Dr. Munslow done the surgery plus seeing what I know, he would be in a better position to give you the [fol. 94] real total picture. Now I did not have the benefit of being present during surgery and knowing exactly what was done. I may have agreed with what I done—what he done and I may have had my own private reservations of what he did. The area with which you are dealing here is a very difficult area and you don't do a great deal unless you absolutely have to. Quite often it may be that you do not do enough but if it's not absolutely evident you don't just keep digging around like any other bone. There is extreme danger of those nerves coming out there, so first, you had surgery done in a very difficult area and you'll never know whether that surgery was sufficient to have corrected the situation. After that, Dr. Munslow, for one reason or another, did not follow the case any further. Perhaps had he readmitted the patient and done other studies he might have come up with another suggestion of further surgery, I don't know, but the fact is that he never got that opportunity—he came into my hands and my management and I took a different direction. We've done some studies, tried to prove that something existed so we could perhaps

maybe do more surgery right away. The fact that we haven't come up with any real glaring evidence as technically sending him to somebody and insist that man needs more surgery, I can only tell you it is my total evaluation of this patient, and the conditions, and the stories I have told you before of instances that I know of where there is definite pathology which we cannot prove. I feel there is something still wrong there that hasn't been fixed and you can't fix it with pills and a little treatment. I don't know what in the world I could do or I would have done it already. There is nothing I [fol. 95] can do, nothing at all that will heal this man. My only idea is that if I could just find an orthopedic man or neurosurgeon that could get interested in this case, that would take him and perhaps work him up and do some more surgery, and maybe that would correct it, but I do not feel that because of the lack of response to all of my treatment that the surgery performed by Dr. Munslow was corrective, and that all that had to be done. I think that whatever he did he did the best he could, but I don't think it corrected his problem, and you can't prove that Dr. Munslow's procedure didn't leave something, that there was something lacking, you can't prove it. It is going to be a difficult decision on your part because you cannot allow yourself to go on just one report or the other—you've got to evaluate the total picture. Now I wish I could stay.

Examiner: We are about through. This was whose?

Attorney: This was x-ray taken at the request of Dr. Morales.

Examiner: Now the other document is whose?

Attorney: Well, I got this from Baptist Memorial.

Examiner: Then I'll return it to you and this other one I'll return to Dr. Morales. This will be exhibit 21 and it's x-ray report of Thoracic-Lumbar Spine and Sacral-Lumbar Spine examination and it's dated April 24, 1966. We will copy this, doctor, and send it back to you, and I want to excuse you doctor, and I want to say that you hit it on the head when you said this was extremely difficult case. Thank you, very much, sir.

(Dr. Morales was excused at 11:40 a.m.)

(Back on the record after a five minute recess).

[fol. 96] Examiner: I believe you indicated, Mr. Tinsman, you want to ask some questions of Mr. Perales.

Attorney: That's right, sir.

ATTORNEY QUESTIONS THE CLAIMANT:

Q. Mr. Perales, before you got hurt you worked for Jim Walters Corporation, didn't you?

A. Yes, sir.

Q. How long did you work for them?

A. Six years.

Q. How long did you work for them?

A. I was truck driver.

Q. Your duties as a truck driver included loading and unloading trucks?

A. Yes, sir.

Q. This included building materials?

A. Yes, sir.

Q. Jim Walters is in the building business of shell homes—isn't that correct?

A. Yes.

Q. In other words, they sell the houses and let the people finish the houses themselves?

A. They furnish the material.

Q. In addition to work, what did you earn from Jim Walters Corporation?

A. I earned $75 a week.

[fol. 97] Q. Did you also work for Jim Walters Corporation on weekends and in the evening?

A. Yes, sir.

Q. What did you do for them?

A. I used to sell houses for them, me and my wife. We got together and I used to sell the house and they'd mail the checks to her.

Q. About what was you making from that?

A. First, I was going pretty good. I was getting about—making about $200 a week, and later on in years I had another manager who didn't like the idea of me

being a truck driver and selling houses so they gave it to the salesman and I would be the truck driver and stay away from selling. So then about two years ago or three years ago I started selling again. I got promoted to assistant manager at $100 a week, then they brought in a man from Corpus Christi and he didn't like the idea of me being his assistant, so he put me back down as a truck driver, and he said that I could sell houses not for $100 or $150 like I was doing but for $50, so I was selling about two houses a week at $50 a house.

Q. Were you doing this?

Claimant: Yes, sir, I had done it so that we—

Attorney: Have you gone out and attempted to do any selling of houses since you got hurt?

Claimant: Well, in February last year I attempted. I was going in my own car and I bought the liability insurance for my car, paid the insurance, and then it happened that date that I was to talk to the manager, I had already talked to him two or three days before and he'd talked to me in the office and they had agreed [fol. 98] to put me on Saturday at $50 a week on salary plus $50 commission on each house. So I was going to Corpus to pick up my wife, and I said I don't want to make that long trip, and she said, oh, come on, she teli me to go ahead. You're going to be a salesman and you're going to work outside the city limits, they go and do the canvasing. So I went on with them and he asked me if I wanted to drive back and I said, no, I don't think I should, and he said, come on. So I told him, well, why don't you back the car out of the driveway and I'll just take it straight on out and I won't twist my back or nothing. So he drove the car, took it out of the driveway and I got the car from there and drove from Corpus Christi and I drove on Highway 9, and I felt a strong wind come and jarred my car and it moved my steering wheel and I told the wife, I said, I told my wife I couldn't control the car, I'm hurting, so I pulled over to the side, I said I can't control it, so I told my wife I can't control it, there's something wrong, I'm hurting my back.

Attorney: After that incident, did you attempt to do any more selling?

A. They wanted to give me a job of selling, that's why I wanted to go back to work as salesman. I had done pretty good before I got hurt at selling, I had my area already built up, I knew I could go back and build it up again, but I found out that I couldn't control the car. No need for me to get out on the highway and get killed or kill somebody else.

Q. Did all sales for Jim Walters involve driving to people out in the country and calling on them?

[fol. 99] A. Out in the country and calling on them. I had liability on my car but that's why, because if I had an accident I wouldn't be responsible for the people in my car.

Attorney: The reason you didn't take a job selling is because you couldn't do the driving?

A. I couldn't do the driving. In fact, I called the office and told them I felt bad after that trip.

Q. Did you wife work before this accident?

A. No.

Q. She never worked?

A. She hadn't worked in 15 years after we'd been married up to about six months ago.

Q. For awhile, Jim Walters, about six months paid your salary, is that correct?

A. Yeah.

Q. And that was under the plan where they would pay anybody's salary six months but the plan provided after six months they didn't pay you any more—is that correct?

A. Yes.

Q. During that time, your wife did not work, did she?

A. No, she was getting commission checks from Jim Walters when I got hurt, on her name.

Q. That was for sales that were made before you got hurt—is that correct?

[fol. 100] A. That's right.

Q. And they paid you $75 a week for six months after you did get hurt?

A. After I did get hurt.

Q. And they told you that was all they would pay you, is that right?

A. That's right.

Examiner: You didn't sell houses during that six months?

A. I was in and out of the hospital.

Examiner: You didn't sell any houses during that period?

A. No, I was sick and got checks during those six months but they were sold back in September.

Attorney: Have you done any work at all since then?

Claimant: No.

Attorney: What's the only source of money your family has to live on now?

A. It's $35 a week that my wife gets at the drugstore where she works.

Q. I think you told me, in relation to the meals your children eat—is your meals the only meals your children get?

A. The one they give them at school, it's given by the Federal, it's one meal a day.

Q. And you don't give them breakfast in the morning?

A. Breakfast and supper. Like I say, when my wife gets feeling she don't want to cook, we go out and buy 15 hamburgers that's 15-cents each, and then we buy a dozen eggs for the whole week because what she brings home, she brings home about $24, she eats one meal a day over there.

[fol. 101] Q. And they take the meals off of her check?

A. She brings home $24.

Q. And that's all you have?

A. Yes.

Attorney: That's all.

Examiner: Mr. Perales, I'm not trying to embarass you but in selling real estate, did you get a license?

A. No, it doesn't require a license. It's not realestate. Lot's of people ask me if I had a license but I understood that we didn't need a license.

Examiner: The reason I ask you is that if you had to take a test to show your qualifications?

Attorney: I think they were selling homes—homes that they would go place on these people's lots.

Claimant: You have your own lot, it's built on your lot, but myself, I don't have a sales speech but my salesman come over the phone, I just happen to answer the phone, they said they wanted someone to speak in Spanish, most of them Spanish, I had a book that shows how much the house is and what the price is. I told them I could give you the dimensions, and they had to make application.

Examiner: I was just trying to discuss a person with his education—

Attorney: You have a third grade education?

Claimant: Third grade.

[fol. 102] Examiner: I'm trying to get more of his background because sometime a person can rise above his education in his experience. Did you drive a car down this morning?

A. No, sir.

Q. You took a taxi?

A. No, I took a bus—correction—I come in a taxi.

Q. Is there a bus by your—nearby your house?

A. It's about 2 blocks.

Q. From your house?

A. From the house.

Q. Wouldn't it be cheaper than taking a taxi to take the bus?

A. Well, it is cheaper, but you see the back or anything like that, it takes me a long time to cross the street here.

Q. I see—downtown?

A. Yes.

Examiner: Did you take any medication this morning?

A. I took two tablets.

Q. What were they, do you know?

A. Parafon or something.

Q. What time did you take them?

A. This morning?

Q. Yes.
A. About 8 o'clock.
Q. Was that for nerves or pain?
A. Pain.
Q. Have you had pain sitting here this morning?
[fol. 103] A. I have pain.
Q. Where is the pain now?
A. It's in my lower back.
Q. In your lower back?
A. Yes, sir.
Q. Not down in your thigh?
A. It start—it's here in my back. See, when I get it on my thighs is when I walk and when I lay down in the legs, and it hurts; when I'm in relaxed position it helps.

Examiner: I have nothing further. Counsel do you have anymore you want to ask or present?

Attorney: No, as far as evidence at this time, but I would like to present you with a brief of authorities.

Examiner: Let me suggest before you do that, let me review this evidence. I'm not satisfied but that we may not have to have a supplemental hearing. I'm thinking out loud—the possibility of rather than having Dr. Morales come back and Dr. Langston coming here—I could subpoena them—but rather than having a debate as to who said what, I would get a medical adviser who is a private consultant, from San Antonio or maybe Houston or Corpus, I don't know, to come in and give me his medical interpertation. He says from this report and the testimony of Dr. Morales I think this man has this.

Attorney: If you do do that—I don't know what your procedure is of selecting one, whether we get any choice or whether it's arbitration or whether you submit something, we submit something, or whether we get the right to cross-examination.

[fol. 104] Examiner: Oh, you would have the right—he would be here in person and you would have every right to cross-examine. This is a very difficult case.

Attorney: I would prefer, if you do get a medical advisor, it would be one who does not consistently testify on behalf of a company.

Examiner: We have—let me say we have a large list of doctors throughout our area—well, just a few in each town, and they have been selected by the Department of Health, Education, and Welfare. They are nearly always board certified, and I don't even select them. The hearing assistant—I tell her I would like to have a neurosurgeon, I would like to have an internist, I'd like to have an orthopedic man—she selects a man, I don't even select the man, and they are pretty high-type people.

Attorney: I don't doubt that, sir, but there are certain doctors, in fact, I think all doctors are basically honest but different people have different points of view because of the type of practice they have.

Examiner: There's no workman's compensation suit pending?

A. Yes, sir, there is. It's on the April docket 1967.

Q. This year, huh?

Attorney: Yes.

Examiner: Is there any reason why it couldn't be held earlier?

A. It's the earliest possible date we could get. In other words, they've paid him compensation for almost a year and a half from the accident. Then we had a hearing on this because after they cut him off he couldn't live on the $35 a week.

[fol. 105] Q. That was a temporary grant they made?

A. This is a statutory provision—$35 a week is all you can get on this—that is, this compensation, so we asked a hearing be had whether he should be granted $60 and then the company cut it off entirely—cut the comp off entirely, and a hearing was had and an appeal was made and immediately set it down for hearing.

Q. Oh, it's been pending before the court and not before the compensation—

A. That is correct, and in Texas you know there's a trial de novo.

Examiner: I know. I understood you to mean it's before the Workmen's Compensation Board, but this is before the court.

A. That's correct. The Workmen's Compensation Commission generally doesn't do anything at all.

Examiner: Anything further?

Attorney: In regard to the medical adviser, I would like to at least have an opportunity to look at your list and say if I get any selection I'd say this is people who we would have confidence in.

Examiner: I would prefer to have the hearing assistant make this selection. I'm not worried about prejudice. The type of doctors we've had, they have been extremely high type. I will give you a chance to qualify him—if he's an insurance doctor, you bring it out.

Attorney: I prefer, because of Mr. Perales, if we had one that speaks Spanish it would help somewhat.

Examiner: I'm not sure that that's what—

(Off the record) (On the record).

[fol. 106] Examiner: Mr. Tinsman, is there anything further you wish to present at this time?

A. At this time, no, sir.

Examiner: I will communicate with you within the next three or four weeks as to what further procedure, if any, may be desirable and certainly you will eventually be given an opportunity to provide a brief. Also, I want to tell you, in my view, the problem here is one very fundamental and I am going to have brief significant parts of this testimony transcribed for my use and I will furnish you a copy. Now if we have a supplemental hearing, I don't want to go back and use the testimony that I make available to you if it means cross-examination—I don't want to reopen, why did you say this, and so on. It's purely an aid to help in further development, developing the case—it will not be for the purpose of reopening and cross-examining, or try to get informatoin of what's already been said—I don't want that. Normally we don't make copies of the record like that but it's pretty serious in a decision in this case—correction—pretty important in a decision in this case. I will get you a copy of that and you will hear in the next three or four weeks. If there's nothing further, the hearing is closed.

(This hearing was closed at 12:15 p.m.)

CERTIFICATION

I have read the foregoing transcript and hereby certify that it is a true and complete record of the hearing.

/s/ Irene B. Greene
IRENE B. GREENE
Hearing Assistant

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social Security Administration
Bureau of Hearings and Appeals

TRANSCRIPT
(Supplemental Hearing)

In the case of:	Claim for:
Pedro Perales, Jr. (Claimant-Wage Earner)	Period of Disability and Disability Insurance Benefits 465-38-6398 (Social Security Account No.)

SUPPLEMENTAL HEARING HELD

in

Bexar County Court House Building
San Antonio, Texas
on
March 31, 1967

APPEARANCES:

PEDRO PERALES, JR., Claimant
RAOUL RICO, witness
LEWIS A. LEAVITT, M.D., Medical Advisor
J. C. POOL, Vocational Expert
RICHARD TINSMAN, Attorney for Claimant

Hearing Examiner
FRANK J. BULDAIN

Hearing Assistant
IRENE B. GREENE

INDEX TO TRANSCRIPT

In the case of
Pedro Perales, Jr., Claimant and Wage Earner, 465-38-6398

[fol. 109] (The following is a transcript of the supplemental hearing before Frank J. Buldain, Hearing Examiner of Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare, on March 31, 1967, in San Antonio, Texas, in the appeal of Pedro Perales, Jr., a claimant for disability insurance benefits based on his own earnings record, social security account number 465-38-6398. Claimant was represented at the hearing by Richard Tinsman, Attorney at Law.)

(The hearing commenced at 8:00 a.m., March 31, 1967)

OPENING REMARKS BY HEARING EXAMINER:

Examiner: The hearing will come to order.

This is a supplemental hearing in the appeal of Mr. Pedro Perales. Subsequent to the time of the last hearing, I reviewed the record of transcript, copy of which was furnished counsel for the claimant, and I felt that one point needed clarification. Mr. Perales had mentioned driving to Corpus Christi, or rather going there in a car, and at one point—or two places, I believe, he mentioned his wife going with him and then another point he said something about they or them—there were other persons involved in that trip so I requested counsel to furnish me with an affidavit of Mr. Perales giving me more details. I received the affidavit and it appeared to me there were some inconsistencies between the affidavit and the testimony. I realize that a person can recount the events on separate days and the events will vary slightly sometimes or be a little different idea or viewpoint—it doesn't mean that unnecessarily they are bearing false testimony, but I felt that the matter of the ability of a person to drive a car for long distances is [fol. 110] of considerable import in determining an orthopedic impairment of the back so I thought I had better pursue the matter further. I requested the district office of the Social Security Administration to contact Mr. Rico and give me a report of what happened—they do that. I've furnished counsel for the appellant the report

that I received and I felt it would be best to have live testimony and rather than have a report of that nature without cross examination, and I therefore yesterday served a subpoena on Mr. Rico and asked him to appear here. I did not discuss the case with him except to tell him I wanted him to appear in this matter and I cautioned him in the beginning not to make any remarks about any transactions with the claimant and he has not spoken to me with respect to any transactions that he may have had with the claimant.

I want to take Mr. Rico's testimony first because the basis of some of my questions to Dr. Leavitt, the medical advisor, and Mr. Pool, vocational expert, will be premised in part on what I at the time can sum up as the capabilities of the claimant.

We have, as I indicated to counsel, we will have a medical advisor, Dr. Lewis A. Leavitt, and Mr. J. C. Pool (vocational expert). The nature of their testimony has previously been indicated. I'd like to ask the three of you gentlemen on my right to please rise and be sworn.

(Three witnesses, Dr. Leavitt, Mr. Pool, and Mr. Rico, are duly sworn.)

Examiner: First we will take Mr. Rico.

* * * *

[fol. 126] Examiner: Mr. Tinsman, I haven't had time to digest what I've heard this morning, I'm trying to feel my way around. It occurs to me you might want to put Mr. Perales on and give his version of whatever you think is necessary—what has happened here.

Let me point out to Mr. Perales—Mr. Perales, you were sworn in as a witness at the last hearing we had, you recall that do you not?

Mr. Perales: Yes, sir.

Examiner: I'm not going to administer the oath to you again. You understand that you are still under oath —is that correct?

[fol. 127] Claimant: Yes.

Examiner: You are testifying now under oath?

Claimant: Yes, sir.

ATTORNEY INTERROGATES CLAIMANT

Q. Pete, would you just tell Mr. Buldain as best you recall about this trip to Corpus? I realize it's been some time ago but tell him as best you recall what happened on the trip.

Claimant: That day I went to the office, I called Mr. Villareal or Mr. Rico. He told me that I needed to get a liability insurance for my car which I did, I got liability insurance, and then I went over and he said well, let's go to Corpus; it was about 4 o'clock in the afternoon and his wife was in Corpus because I remember correctly, her mother had been in the hospital and had been sick at that time and he drove down there and on the way back he asked me to drive and on the way back we had his wife.

Examiner: On the way back what now?

A. He asked me to drive.

Q. Had you drive on the way back?

A. Yes, and we had his mother and his wife coming back. On the way down we were by ourselves and I told him, I said, if you drive the car out of the driveway and put it straight home I'll drive it.

Attorney: Why did you want him to back it out of the driveway?

A. Because I couldn't look back, I couldn't pull the car out, I couldn't turn around and look back so he pulled the car out of the driveway that was at his mother's house and I drove about 65 miles and I told his wife to wake him up, that I couldn't control the car.

[fol. 128] Attorney: Did he finish driving on back?

A. He finished driving on back to San Antonio.

Attorney: All right. Had he talked to you about going to work for the company like you heard him today, working in the office and selling?

A. Yes. You see, before I worked for him it was the understanding I was going to work in the office, the area there. After I got my insurance and talked with him he told me that I had to go out and canvass and knock on doors, I had to go canvassing and knock on doors and drive my car and they were going to pay me $50 a

week, and I told him well if that's the way it's gonna be, that's the way I'll do it and when I came back I phoned next morning and I told him I couldn't work, I couldn't get down to the job and he said well, o.k., it's up to you if you want it, we'll give you $35 a week and I said well, if that's the way it's gonna be that's the way it's gonna have to be and later on, about a week or two weeks later he called me and said they were going to have to terminate me.

Q. What do you mean by terminate you?

A. I don't know what it is, that I wouldn't have a job no more or something like that.

Q. Who called you on that?

A. Mr. Villareal and Mr. Rico. I knew him as Mr. Villareal and that's what I call him and he told me they had to terminate me and get me off the payroll.

Examiner: That was the termination that—

Claimant: They had to get me off the payroll.

Examiner: Oh, that $75 a month—

Attorney: Would you be willing to go back—do you think you can do the job? You heard Mr. Rico talk about [fol. 129] the kind of job you were offered to where his lowest paid man is $800 a month—are you able to go back and do that work now?

A. I don't think I'm able to because going and walking I get all swollen up and in fact sitting down I get swollen.

Examiner: In fact what?

A. Sitting down, walking, standing up, I get all swollen up.

Examiner: Where do you get swollen up?

A. My neck, and then I turn purple.

Q. You turn purple?

A. Yes, sir, and my legs and my arms they get weak, they get numb, in other words, I just feel like I have strength enough to carry my body, that's the way I feel, and my back hurts and I have severe pain in my lower back. I have headaches and dizzy spells.

Attorney: You do know what is involved in selling, Pete; you did some selling before you got hurt, didn't you?

A. I did some selling—see what I was doing I was bird dogging. While I was delivering lumber somebody would come to me about the house and ask me questions about it and I asked them did they have a lot and they said yes, I said well, I asked them if it was paid for they said yes, I said well then I can talk to you about the house. That's the only way I sold. I didn't walk up there and knock on a door and ask the people if I can come in and show them anything, I just talked to people on the job. They'd come to see the lumber and who was building a house and I'd pick up a sale there, and sometimes when I'd answer the phone it would be somebody want information—Spanish speaking people. I would tell them and ask them if they had a lot and if it was paid for.

[fol. 130] Examiner: Excuse me a second. On some of the documents we have here, Mr. Tinsman, where I think there is a place for a request for a telephone number, Mr. Perales has previously furnished a telephone number. I want to ask him at this time, do you have a telephone at home?

Claimant: Yes, sir.

Examiner: You have it now?

Claimant: Yes, sir.

Examiner: May I see the file that I handed you. (Documents are handed to the hearing examiner).

Examiner: Among the documents that I handed counsel shortly after his arrival this morning is a number of documents that were furnished to me through the Austin District Office of the Social Security Administration. They contacted the Industrial Accident Board in Austin and obtained copies of documents which have been filed in the proceeding there for his disability claim. I propose to make these documents a part of the file. Mr. Tinsman, do you have any objection?

Attorney: We object to the medical reports that are there. They don't give us the right of cross examination in regard to the doctor's findings. We realize they are official records but I think anyone that has handled workmen's compensation claims knows that a claimant's full case is never presented before the Board. Statistics show

that 90 percent of the cases were ruled on by the Board of Appeals to the Courts.

Examiner: Some of these statements made by the doctors here do not relate just to his physical condition —there are other items there.

[fol. 131] Attorney: My objection is basically the doctors are not available for cross examination. Sometimes we find that what is said in the report can be explained a little differently when the doctor is asked a few questions about it.

Examiner: I'm not too concerned about any medical statements in here as to medical condition.

Attorney: Anything signed by Mr. Perales is clearly admissable.

Examiner: I am going to make the documents a part of the record. I will bear in mind your objections and I think certainly they have some validity.

Attorney: My main point is we did not submit any medical evidence of our own which we never do before the Board.

Examiner: These will be admitted into evidence as exhibits number 25-a—1.

Attorney: That isn't the complete Board's file, is it? It can't be because they don't have the award in there.

Examiner: I'm sure that it's not and I'll be happy to get it if you think it's desirable.

Attorney: We find no—I'm looking through my file and I know that the Award Board is here. I really don't feel that has any bearing on this. All I do know it's not the complete Board's file.

Examiner: I think you are correct and I debated whether I should go back and get the whole file. I may eventually. If I do, you will certainly be advised, or if you have copies there and you will make them available—

Attorney: No, I don't have the complete file either. Generally we don't really care what the Board's got.

[fol. 132] Examiner: Among these documents, the one which I have identified as exhibit 25-i, a letter from Dr. Munslow to Mr. Gordon Cook of Continental Casualty Company, and there is a statement here in which he states, "Two weeks age he" (he refers to Mr. Perales)

"told me that he had fully intended to go to work and felt capable of doing it, but he drove to Corpus and on the return trip he said that his car was buffeted by wind to the event his back began to hurt again." I point that out in connection with the testimony.

Attorney: The only question is whether Dr. Munslow means he drove in the car or drove the car is not clear.

Examiner: That's correct. This point I was coming back to statement made by Mr. Perales, exhibit 25-b in which he explained he was getting this $75 a week, and in addition he had been receiving—no, he was about to receive $35 compensation checks, but that his $75 check from the company would be cut off.

Attorney: It was cut off two months before he made the affidavit.

Examiner: Right. Then he said this—supporting three children and a wife on $35 a week is virtually impossible. I will be unable to continue doing this. I have no more savings and no other income to supplement the $35 workmen's compensation. My wife has to take care of me at home and is unable to work.

Now I understand she has gone to work?

Attorney: Even though she had no training, out of necessity she has gone to work.

Examiner: As I recall, her take home pay after deductions was about $24 a week?

[fol. 133] Claimant: After she deducts her bus fare and her meals, she brings home about $24 or $25.

Examiner: The question that I have in my mind, I could have written the decision the first time but I wanted to give you a chance—we have a claimant who from all indications is having a hard time financially but he is able to keep a telephone at home. I find it hard to reconcile the two. Now I would like an explanation if there is one.

Claimant: There have been times that I want to disconnect it but my wife doesn't want to disconnect it. Right now, I owe about 3 months back on my phone.

Examiner: You have what?

Claimant: I owe three months on the phone and I want it disconnected but she said no, it's necessary to

have a phone at home because the children sometimes come home at three o'clock and if they have any problems or if I'm asleep or something happens to me, they can get in touch with me. We don't have nobody there, no friends or nobody at home or around the house. We need the phone at home, it's necessary to have a phone.

Examiner: All right.

Attorney: How have you been living, Pete? Do you have any other source of income other than your wife?

A. No, sir, I have no other income, my wife makes just enough to pay the rent and the bills that we have and that's all. There's no money left for groceries except maybe $10, $12, $14, $15 a month. My children get their meals there in school, they get it free from the government, that's 4 meals a day, that's all they get, and now school is gonna be out in the next couple of months, I don't know what I'm gonna do with them.

[fol. 134] Examiner: All right. Before I turn to Dr. Leavitt, anything further you want to bring out, Mr. Tinsman?

Attorney: No, I don't believe.

Recess—

Examiner: Hearing will come to order. Let the record reflect that Mr. Tinsman and myself went to the office of Dr. Morris H. Lampert and obtained a copy of the report made by Dr. Lampert on 3 May 1966 and referred to in exhibit 25-h. Dr. Lampert's report is identified as exhibit 26 and hereby made a part of the record.

Attorney: We will object to Dr. Lampert's report on the basis he is not here to cross examine.

Examiner: Yes. Now, we will proceed with the examination of Dr. Leavitt.

(Witness, DR. LEWIS A. LEAVITT, medical advisor, after having first been duly sworn, testified as follows):

INTERROGATION BY HEARING EXAMINER

Q. Doctor, will you please state your name and address?

A. Dr. Lewis A. Leavitt.

Q. And your address?

A. My address professionally is 1333 Moursund Avenue, Houston, Texas.

Q. You are a doctor of medicine, are you not?

A. Yes, in the State of Texas, County of Harris.

Q. Will you give your educational background, please, sir?

A. Graduated from Loyola University with BS Degree; from St. Louis University School of Medicine with a MD Degree; following which I had post graduate training at Tulane; I have my American Boards in Physical Medicine and Rehabilitation. At the present time I am [fol. 135] Chairman, Department of Physical Medicine at Baylor University College of Medicine at Houston, and Professor of Physical Medicine & Rehabilitation; I am Chief of Service at affiliated hospitals, that is, Methodist, St. Luke's, Texas Children's, Ben Taub, Jefferson Davis, and Texas Research and Rehabilitation, and Consultant to the Veterans Administration in my specialty.

Q. How long have you been working in the field of medical rehabilitation?

A. For 20 years.

Q. Out of those years, how many years have you been at Baylor University?

A. Of those years, 16 years have been associated with Baylor University, last 6 as Chairman and Professor.

Q. You have been furnished with copies of exhibits No. 1 through 26 of this proceeding, I believe?

A. Yes, I have been furnished the medical exhibits, I have reviewed those opinions of those physicians who have examined the claimant.

Q. You have also read the transcript of the record in the hearing that was originally held in this case?

A. Yes, I've read the transcript.

Q. Even though you were not present at that time?

A. I have received copy of this transcript I have here and have read this transcript.

Q. Have you heard the testimony this morning here?

A. I heard the testimony this morning.

Q. Of course you are here at my request. Have you and I discussed this case?

A. No, sir.

Q. Course you are being paid a fee by the government but you appreciate the fact you are here as an independent advisor with loyalty to no one—completely independent?

[fol. 136] A. That is right, sir.

Q. And you have had a chance to study those medical records?

A. I have studied them in some detail.

Q. I am going to ask you to tell me the organic impairments, if any, which you think these records reflect?

Attorney: Just for the record, Mr. Buldain, I would like to protect my record and object to any testimony that is not based on any hypothetical question or based upon examination.

Examiner: I understand. And of course, you have not examined the claimant?

Dr. Leavitt: I have never seen the claimant before, professionally or otherwise.

Attorney: I'd like that to be a running objection through all the testimony.

Examiner: All right. I'd like to point out, Mr. Tinsman, at this point, he is here as a medical advisor to help me interpret what is in here. I haven't examined him, I am not a doctor, he is here strictly as an advisor.

Attorney: Yes, sir.

Examiner: And to give me his evaluation on the basis of what he finds there and I have to rely on medical expertise to interpret. Any time that he gets beyond that you certainly have a right to object and speak up.

Examiner continues: Now based on this record, doctor, will you give me the organic impairments of which this individual—correction, from which this individual may be suffering?

A. I'd like to point out some information in the exhibits which have been submitted and I have reviewed. [fol. 137] In two instances it is noted the patient with initial injury in September of '65, lifting 65 to 75 pounds and in other instances lifting 225 pounds. I wonder if this could be clarified.

Examiner: Mr. Perales, what was the approximate

weight of the material which you were lifting at the time?

Claimant: It was 4 bundles to a square which weighs approximately 250 pounds. I lifted one bundle out of the square.

Q. The square itself?

Claimant: The square, 4 bundles to a square.

Q. Four bundles weigh how much?

A. Two hundred and fifty pounds.

Q. And you lifted one?

A. One bundle.

Q. One bundle out of the square?

A. Yes.

Q. So it would be one-fourth of the 250?

A. About 65 pounds.

Dr. Leavitt: And the date of injury was September rather than November?

Claimant: September 29.

Dr. Leavitt continues: The first qualifications of a traumatic situation the objective neurological findings of the physicians as submitted in this medical evidence would indicate the patient initially had a low back pain secondary to the lifting of this weight of approximately 70 some odd pounds from which he sought medical advice and care, presenting complaints at that time with pain in the back manifested by some muscle spasm of the low back, was hospitalized and x-rays were noncontributory.

[fol. 138] Examiner: X-rays were what?

A. Non contributory indicating the patient was placed on medication and treatment following which he did not obtan relief of his symptoms and was subsequently hospitalized at the Nix Memorial Hospital on 1-19-66 to 1-25-66 by Dr. Munslow. A repeat myelogram was accomplished which showed the presence of Pantopaque substance in the subdural space from the first myelogram, otherwise essentially normal x-ray examination. A operative procedure was performed preceding this—

Examiner: You mean preceding this second—

Dr. Leavitt: Preceding the repeat myelogram which was a partial or a hemilaminectomy. This report indi-

cates the surgeon, Dr. Munslow, could not find a herniated neucleus pulposus or any mechanics that would cause the pain syndrome of which the patent complained with the exception of some tightness of the nerveroots in the dural sac, particularly at the level of L5.

Q. Now when was this?

A. This hospitalization was 11-21-65 through 12-4-65.

Q. I am trying to get the sequence of this now. This, as I understand, there was a pantopaque—

Dr. Leavitt: There was no record submitted of the initial myelogram that was accomplished but from references to this one has drawn the conclusion this initial myelogram was negative.

Examiner: This second myelogram in which the pantopaque was taken, this was after the laminectomy?

Dr. Leavitt: After the hemilaminectomy.

Q. I understand you to say with the exception of some tightness of the what now?

[fol. 139] A. Of the dural sac. The dural sac is a lining or the covering of the spinal cord in the spinal canal and except for some tightness of this sheath that covers the spinal cord, there is no pathology found and his final conclusion on the operative report was written root compression syndrome, no mechanics involved.

Examiner: What was his impression there?

A. Root compression syndrome with unknown mechanics involved. He did a laminectomy, that is he made a surgical approach to the area of pain looking for some evidence of what he had preoperatively felt might be a herinated nucleus pulposus or ruptured disc. At surgery he did not find this. The only thing he could find at surgery in the hemilaminectomy was some tightness of the dural sac which might have been giving some mild pressure to the nerveroot as it came from the spinal cord out through the cauda and down into the lower extremity.

Q. In other words, the nerveroot compression was the result of the tightness of the dural sac?

A. This was the only thing he could surmise and this was not striking.

Q. What do you mean this is not striking?

A. This was the only thing at time of surgery when

he went in and was looking at this pathology, this tissue was the only thing he could find which he thought might be causing the patient's pain, but this in itself, according to his record, was not marked.

Attorney: Let me ask you this, doctor—what reports of Dr. Munslow do you have?

[fol. 140] Dr. Leavitt: It is the operative procedure from the Nix Memorial Hospital dated 11-23-65.

Examiner: Mr. Tinsman indicates there are several reports—of course Mr. Tinsman these have been in evidence and open for examination for quite sometime.

Mr. Tinsman: You see you didn't have any reports from Dr. Munslow until the industrial accident record was brought in. I have four other reports that Dr. Munslow has written.

(Documents are handed to the hearing examiner)

Examiner: Do you have any other reports, Mr. Tinsman?

Mr. Tinsman: No, sir.

Examiner: There are four medical reports from Dr. Munslow dated 12 November, and 22 November '65, and 3 January and 1 February 1966. They are marked exhibits No. 27-30 and are hereby made a part of the record and will be reproduced and these copies returned to Mr. Tinsman with the reproduced copies being the ones of record.

Dr. Leavitt: These four medical reports of Dr. Munslow would indicate in general that these are for the patient's hospitalization at Nix Memorial Hospital, admission date of 1-19-66. At prior to the surgery there are indications why Dr. Munslow felt he had not responded to conservative management at home and then followed, that there was some sciatic relief bilaterally, left more than right, which is radicular pain from the back going down of the involved extremity and there is some reflex changes that had decreased which would be indicative there might be some pressure in the low back secondary to a protruded disc and that for these reasons he felt he should do surgery which he did and this surgery was accomplished and hemilaminectomy left, L5 of 11/23/65.

[fol. 141] At that particular hospitalization the provisional diagnosis prior to admission, or on admission, was low back pain, and discharge diagnosis—which he did not find anything of indication of "APD" (a protruded disc) —was neuritis, lumbar, mild.

Examiner: Just a second—on discharge from the hospital the diagnosis was what?

A. Neuritis, lumbar, mild. In other words, this means the man had an irritation—itis—neuro means nerve, itis means inflammatory or irritation of the lumbar nerve which is a very vague general type of nonspecific diagnosis. The patient was subsequently, following this, was then treated by a Dr. Morales, a general practitioner, and his only objective information that he had, according to these records, was spasm of the low back, musculature, and tenderness. No objective neurological information was submitted in these records.

Examiner: Except for this spasm?

Dr. Leavitt: Except for the spasm, with secondary limitation of flexion of forward bending of the back. Dr. Morales, a general practitioner, treated the patient rather lengthy with analgesics, some low-grade narcotics, codeine, spasmolytic medications and he would go from one type of pharmaceutical to another all in a broad broad realm of analgesics of which are pain relieving or spasmolytic—which is medication to relieve muscle spasm with occasional narcotics but varying drugs, varying medications, in each and every level he would use one drug from another, drug from another, drug from another but basically they were this type of medication, analgesics, pain relief, spasm relief, to relieve muscle spasm and occasional codeine to help relieve pain. Dr. Morales had no other objective neurological information in his report other than the patient had had hemilaminectomy previously and the residual defects showing on x-ray that some bone had been excised in order to do [fol. 142] the operative procedure. This is a routine standard type of x-ray which you will find in any patient who has had a hemilamectomy or a laminectomy.

Q. Does Dr. Morales make any specific diagnosis?

A. Dr. Morales would talk about herinated nucleus pulposus but had nothing to verify this impression, no objective neurological findings. There was another examination done here on 12-17-66 by a Dr. Mattson who is an electromyographer in this city who did electromyographic examination on 12-17-66, examining those components of L4 L5 and S1. This examination, which basically is examination very similar to electrocardiographic examination—I think we are all familiar with electrocardiographic examinations—which with wire attaches electrodes to the skin to pick up the nerve potential and muscle potential.

Q. And you get a graph reading?

A. You get a graph reading on a graph and this is the same basic principle as far as myelotronics is concerned, only one is examining the motor potential of the muscle and nerve in the extremity rather than the heart muscle and nerve. This electromyogram is as accurate as, according to literature, as a myelogram. They run about 80 to 85 percent accuracy—both of them do. Some authors in literature will quote as high as 90 percent accuracy plus with an electromyogram—others in the 80s. Myelographic studies will have a 70 or 80 percent accuracy according to your literature, but Dr. Mattson performed an electromyographic examination on 12-17-66 which was negative except for some polyphasic motor potentials. Now this was done after surgery so one would expect to find polyphasic potentials following surgery.

Examiner: What does that mean, polyphasic?

[fol. 143] A. Polyphasic potentials means that (Dr. Leavitt is demonstrating on a blackboard) a muscle that is normal at a base line, as such, at rest—it's a flat base line—with no electrical activity noted in a patient that has a voluntary normal muscle you will have a diaphasic potential positive deflection and negative deflection above the base line. Now a polyphasic potential is a potential that has several deflections above and below the base line. What they were looking for is called fibrillation potentials which look like that, and that is present at rest. This signifies that the patient has had or does

have an involvement of that particular nerve. By examining those motor components involved one can differentiate which nerveroot and how much is involved. This is accepted procedural medical legal aspects that with the exception of a polyphasic potential electromyographic examination performed by Dr. Mattson was negative, that is, the polyphasic potential following surgery is accepted normal type of finding and is non-diagnostic.

Examiner: You have there two sketches which I am going to ask that you make copies later for inclusion in the record. The top one you have, is that the one illustrating polyphasic?

Dr. Leavitt: This is polyphasic.

Q. The sketch below?

A. This fibrillation potential but now fibrillation potential and polyphasic potential together are significant; fibrillation potentials by themselves are significant; polyphasic by themselves are not significant or diagnostic.

Q. In this case there were no—

[fol. 144] A. No fibrillation potentials noted; some polyphasic potentials noted in post-operative patient which one would assume is present, not significant or diagnostic.

Examiner: Mr. Tinsman, I am going to ask the doctor to make sketches there on a piece of paper and to write side of each one the type of potential as indicated and that will be made part of the record. Doctor, later on after you get through testifying, if you will please.

Dr. Leavitt (continues): Another objective finding Dr. Mattson noted in his report was that the EMG would indicate there was psychogenic or functional component present and that this volitional control of voluntary motor potential was decreased, which had been borne out previously by other physicians and their clinical examination.

Examiner: What does that mean?

A. In so many words it means the patient wasn't trying to bring up the foot or the knee in a good forceful manner.

Q. Is that the electromyograph examination indicated that?

A. Yes, and this is an accepted fact in literature also.
Q. Would that be willful or could it be?
A. He further verifies this—it was willful by electromyographic examination which further verifies that this was willful, objective neurological findings by Dr. Langston indicated and correspond closely, Dr. Lambert has shown that the straight leg raising test was positive on the left, and test position—that is when the patient is lying down flat on the examining table you raise the leg up—that this was positive but in a sitting position which [fol. 145] is strictly done to see whether or not another position being tested that the patient could extend the leg to 90 degrees whether it's sitting or lying, would indicate that one in recumbent position was not valid; the one in sitting position to 90 degrees was valid. Therefore, the SLR was not too abnormal, somewhat but not too abnormal.
Q. The SLR?
A. SLR—stright leg raising test. See, in the straight leg raising test you are putting the nerve on stretch and if there is involvement in the nerve the patient has further pain through motion. You start here and 45 degrees, about so, would be a positive SLR, 60 degrees is less positive, 70 is less positive, 90 is normal.
Q. That's in the prone position?
A. 60 to 70 degrees—a sitting position is 90 degrees.
Q. And that would indicate—
A. Relatively normal, not completely but relatively. Dr. Langston's opinion was negative, neurologically. He himself picked up something in the x-rays I thought was quite interesting which no one else had picked up in this case—that this man has a lumbarized first sacral.
Q. He has—
A. Lumbarized first sacral. In other words, he has six first lumbar vertebrae rather than five.
Q. What is the significance of that?
A. It's congenital—it's an x-ray impression and means nothing.
Q. That has no bearing?
A. It has no bearing—it's a localization that actually Dr. Munslow instead of examining L5 was examining

L6 but it actually means nothing as far as organic pathology is concerned. Dr. Langston's impression was chronic back strain, mild.

[fol. 146] Q. How does that compare with the previous finding of neuritis, lumbar, mild?

A. I think it's a time sequence is the important differentiation there. The neuritis, lumbar, mild, was made upon discharge from the hospital which one would expect to a certain degree of "irritation" of the involved area. Dr. Langston's examination was made at a different time so his terminology of this whole syndrom was chronic back strain, mild.

Q. Dr. Langston was somewhat later after discharge?

A. About a year, I believe.

Q. Again, I ask you—I'm not questioning the point but I'm trying to see if chronic back strain, mild could also be another way of saying neuritis lumbar, mild.

A. Basically, with the execption of the time sequence. One was following surgery and shortly after surgery in the hospital, where the other is made months later but this all fits in with the generic syndrome of the back syndrome. Now the more recent medical information of Dr. Lampert's can be summarized basically by saying there is no objective neurological information submitted for the cause of the present back strain or lumbar back syndrome and it is primarily from histronic that all of his impression is made.

Q. Now doctor, I am a little confused. You used the term histronic or—what's the term you used then?

A. Histronic.

Q. H-i-s-t-r-o-n—

A. H-i-s-t-r-o-n-i-c.

Q. Does that have a medical connotation?

A. No. It's accepted work that means there is a history of.

[fol. 147] Q. It doesn't mean acting?

A. No neurological finding, therefore, we are getting awfully close to more of a functional component. If you have a history, then you have laboratory examination and tests indicating and verifying these findings from

history, then you make a diagnosis—that is "arguing medicine". Then if you have history then you have histronic. The minimal amount of objective findings with an impression makes one then say histronic or from history the patient has. Dr. Heffner, another neurosurgeon, stated while the patient was in the hospital at Santa Rosa Hospital that he thought this thing was mainly musculoligamentous—again the low back syndrome.

Q. What did he call that?

A. Musculoligamentous. That means muscle and ligaments that are involved primarily, and his recommendation was placebo. Placebo is medication that has no effect on the patient and progressive activity.

Q. Now that type of involvement is something—I don't know, I should ask it this way—is that something unrelated to the herniated disc or can that be related to the herniated disc?

A. It means having a herniated disc one has only involvement of the muscles and ligaments secondary to a traumatic situation which has strained that area. Dr. Bailey, a psychiatrist, also examined the patient and his diagnosis was basically that there was no major psychiatric illness; that there was an emotional component involved. There are other words involved here but I don't particularly want to use them at this time.

Q. Let me ask you this—would a neuritis lumbar, mild, or a chronic back strain, mild, whatever the term in either of those two—

[fol. 148] Dr. Leavitt: I think one can use the broad generic type in the low back syndrome. This would be a title and under this should have the subtopics.

Examiner: I see—low back syndrome. Now would this low back syndrome be consistent with an emotional involvement?

A. The low back syndrome would be the impression of these physicians in general.

Q. Based on objective—

A. Based on, 1—trauma incident history; 2—emotional secondary problems.

Q. There is an emotional involvement that does contribute to this?

A. Yes.
Q. Low back syndrome?
A. Definitely.
Q. Now this low back syndrome—I'll ask you later, go ahead with your explanation, I'll ask the question later.
A. Well, I believe then Dr. Thaggard in his impression of the x-rays that have been taken was no fractures of the dorsal lumbar area, negative lumbosacral spine with the exception of the "operative deficit secondary to the hemilaminectomy" which in itself is a noted finding and the presence of some opaque material from previous myelogram. And the second interpretation of the myelogram, any excess dye was tried to be removed so it wouldn't have a secondary complication of any involvement from this, and I believe that would summarize basically what the information has elicited.
Q. Then from remarks you made a moment ago, would it be fair to say this claimant has an impairment which may be identified as a low back syndrome?
[fol. 149] A. I think this would be accepted terminology from these varying physicians reports.
Q. I ask you, from these reports what would the severity be of this impairment:
A. From the medical information submitted by these doctors would seem to be concensus of opinion this is mild.
Q. What limitation of motion would you place on an individual of his age, based on the history of the medical and medical evidence, what limitation of motion would you place on him?
A. I'd like to clarify that by stating that these physicians, neurosurgical, orthopedic, and others, have stated and have recommended that the patient should have a remedial progressive program so that he with such treatment could regain more normal function of the involvement of the back, but the recommendation would be progressive activities because as these physicians have stated, that in such a syndrome and my professional opinion that you won't get well unless you continue to progress with activities.

Q. You are saying in a nice way, doctor, that this man needs to have more physical activity, regulated?

A. And this is progressive therapeutically supervised.

Q. All right. Now, back to the question. What limitations of motion—I better ask another question before I get to that. What was the date of the finding of neuritis lumbar, mild?

A. That is the final diagnosis of exhibit 10-f from the Nix Memorial Hospital and apparently the discharge date is 1-25-66, if what I am looking at is the discharge date.

Q. That was apparently shortly after the hemilaminectomy—is that correct?

[fol. 150] A. On a previous record from the Nix Memorial Hospital, when this date was 11-21-65 to 12-4-65 which was at the time of the laminectomy, partial; the hemilaminectomy was on 11-23-65.

Examiner: What limitations of motion would you place on this individual with the diagnosis of low back syndrome, mild?

A. That is a difficult question to answer from a professional viewpoint when I haven't examined the patient. I think it would vary with the patient. But in general I would say that a person relatively able bodied with an impression—diagnostic impression of low back syndrome, mild, should be able over a relatively short period of time —by that I mean a month or so—to resume activity that should be commensurate with an 8 hour a day that would not have severe lifting or stress to the back, so one would not have an exacerbation of the previous condition. In general, one might say the person is "ten percent disabled".

Q. When you say severe lifting, I take it that depends on the method of lifting. He shouldn't lift—I'm asking you these questions, you correct me if I'm wrong —I take it there are some types of lifting a person can do without strain on the back and other types that do put a strain on the back?

A. Yes. What lifting such an individual would do with a history of low back syndrome of many months duration is that flexion of the spine should be limited

and that one should lift with a straight spine and use the legs and arms for absorbing the stretch rather than bending forward.

Q. What would be the maximum amount of weight that he should lift with his condition?

[fol. 151] A. I think this would vary according to the amount of "back spasm and low back pain" one would have. But I would feel one should be at the earlier phast able to lift at least 25 or more pounds then with progressive activity this would improve and the amount of weight of lifting should improve as the patient improved.

Examiner: Doctor, you heard the testimony this mornning on the matter of driving an automobile and you heard the previous testimony I believe of Mr. Perales that he drove 65 miles in one stretch. I believe Mr. Tinsman has also testimony that he has done occasional driving for short distances in and around town.

Mr. Tinsman: That is correct.

Examiner: Now without—

Dr. Leavitt: You see, driving in today's modern car, like this gentleman is able to sit here in this particular chair height which is physiologically acceptable to a normal individual, but in the modern car we are placed in a different position—we are sitting not 18 inches or 19 inches off the floor but say about 8 inches off the floor, our legs are extended in a position the back of the seat tends to bow you forward, all of which would tend to exacerbate his condition or any person's condition with low back syndrome. This is a temporary exacerbation.

Q. If he had to drive to work, let's say 10 miles a day, part of that through downtown traffic, and then drive back home 10 miles a day—

A. This would not be contraindicated.

Q. This would not be contraindicated?

A. No.

Q. Can you tell me—I'd like to know what you mean?

[fol. 152] A. In other words, an individual with a low back syndrome, mild, might have some mild discomfort during this particular time but this would not be medically contraindicated for him to do so.

Q. In other words, he could do it without risk?

A. Yes.

Examiner: All right. Mr. Perales, what kind of car did you say you have?

A. '55 Oldsmobile.

Q. The seat is fairly high on that, isn't it, compared with the more recent cards?

A. Well, it's not like the new car.

Q. I believe you stated you have power brakes on that car, is that correct?

A. Power brakes.

Q. Do you have the hand—you don't have. Do you have power steering, is that right?

A. No, sir.

Q. You do not have power steering?

A. No, sir.

Examiner: Doctor, with that lack of power steering alter your—

A. No, sir.

Examiner: Mr. Tinsman, would you like to question?

Mr. Tinsman: Yes, I would.

ATTORNEY INTERROGATES DR. LEAVITT

Q. This man has had these multiple complaints just about ever since he got injured to all the doctors are basically the same, haven't they doctor, the history he has given each doctor?

[fol. 153] A. His history of this type of problem.

Q. And has remained rather constant throughout all of the reports of the doctors that saw him—minor variations?

A. His repetition is the same history, that's true.

Q. Actually when Dr. Munslow first saw him, I think according to his report, Dr. Munslow was almost convinced the man had a portruded disc isn't that correct?

A. That's true but he didn't find it on surgery.

Q. But all of the doctors the man has seen, they have been attempting to find some reason why this man has all of these complaints—isn't that correct? They've all found he had complaints and been attempting to find some objective basis for it?

A. The examiners have attempted to elicit any specific and objective neurological findings which might be indicative of the reason why he has pain, which they have not been able to find.

Q. I would like to discuss some of the emotional things that we have talked about. I notice Dr. Lampert brings this out in the final light of his report, also. Could it be true that part of this man's difficulty is the fact he has a low back syndrome coupled with an emotional problem?

A. I think from the reports that have been submitted here and opinion of these doctors, both psychiatry and neurologist and neurosurgeon, that this is true.

Q. And it's this emotional problem coupled with the low back syndrome that's really giving him all the difficulty—isn't this true? Isn't this what's indicated by all the reports?

[fol. 154] A. This seems to be present.

Q. I think he told Dr. Bailey here there is an indication that he wants to get well—he told Dr. Bailey he'd get well even if he has to go to Mexico or somewhere else to find doctors smart enough to cure him. He has indicated all along—

Examiner: Mr. Tinsman, let's not argue with the doctor, just ask your questions. Save your argument for later.

Mr. Tinsman: This emotional impairment that he has from the records, it indicates that he may have been there before but it was accelerated—

Dr. Leavitt: Dr. Bailey here has a diagnosis, which you have a copy of, if you'd like to bring that out.

Q. Dr. Bailey indicates he has this problem before the accident?

A. Right.

Q. In one sense, isn't it true that when you do have this problem, maybe not come to the surface, you are able to get along adequately as long as you don't have an accident or something?

A. And it's frequently worsened by lack of activity or work.

Q. All right. But isn't it true that one with this emo-

tional problem that he does have, isn't it true that many times this will keep him from doing the work or he has obtained and have all these symptoms, he's told all the doctors about part because of emotional problem, partly caused by the low back syndrome and these together will keep him from adequately functioning?

A. Each of these physicians that you have talked about all have recommended that he get active and this might be the best treatment that he could have. Resumption of normal activities of daily living.

[fol. 155] Examiner: Excuse me, Mr. Tinsman, I don't want to break into your train of thought but I'd like to clear this point here. Doctor, with the emotional problem would the therapy be part of the treatment?

Dr. Leavitt: Dr. Bailey states here this is not a psychiatric illness, this is a functional component and the accepted treatment for this type of thing is activity.

Examiner: In other words, the activity is part of the therapy for the emotional problem?

A. If we had a psychiatric illness then we are talking about something else but when we don't have a psychiatric illness, when we have only the emotional components that are not psychotic, there is no specific psychiatric illness, then it is an accepted procedure and in all hospitals that progressive activity is the best you can have for this type of program that is curative.

Mr. Tinsman: You indicate—I think you testified this progressive activity should be under some kind of therapeutic supervision also?

A. Which these physicians have offered in their statements throughout the medical statements.

Q. What do you mean by that—what do you mean by therapeutic supervision?

A. That Dr. Munslow has stated and the other doctors have stated that this patient should be able to resume work and that they would be working with him on outpatient status—he comes in, they would help him to get back into normal activity again.

Q. If the patient has attempted to back to work and perhaps because of his emotional problem has been un-

able to do so, is it possible that he would be unable to do the work because of his emotional problems?

[fol. 156] A. I think Dr. Bailey emphasized that point when he said this, no psychiatric illness, that there are tendencies and the trend is here but no psychiatric illness which is very good that the patient does not have this.

Mr. Tinsman: Dr. Bailey also indicated he has a limited education handicap?

A. That would—from the testimony here, and it's noted in the records here, this many with those limitations was doing quite well in many respects economically.

Mr. Tinsman: That's right but since the accident of course he has been offered a position and at least started to go back and take it and found that he couldn't do it and he has been unable to get anything. Are you saying from your examination—

Dr. Leavitt: I haven't examined the man.

Mr. Tinsman: Excuse me. From reading the reports and the testimony that you have heard, are you saying the man doesn't want to go back to work and this is the only reason he hasn't gone back to work and this is the only reason he hasn't gone back to work because he just decided he doesn't want to?

A. All I can interpret is what the physicians who have examined the man over a period of many weeks have stated, that he from a physiological psychological level should be able to return to work and that they indicated they would be glad to help him do so.

Q. It is true, isn't it doctor, from the complaints that he has made, if you just take the history and go by his-

[fol. 157] tory, if he was having those complaints and let's say there was some basis for them regardless of what the basis is that he was actually having those complaints and not bullying them, would it not be difficult for him to do any work if he was having all of the complaints he has told the doctors about each time?

Dr. Leavitt: Are you asking me for my opinion or the medical records?

Counsel: I am asking you about the complaints that are shown in the medical records.

Examiner: I think Mr. Tinsman, the doctor is entitled to an answer.

Mr. Tinsman: That's right, I am asking for your opinion.

Examiner: Based on what?

Mr. Tinsman: Based upon asking him to assume the man actually has the complaints shown in the reports that he has reviewed.

Examiner: I don't think there is any question but the man has any complaints—you needn't assume that he has had the complaints, so now ask your question.

Counsel: With the complaints that he has had, assuming he has them when he goes to work, do you think he would be able to do the work with all of these back complaints?

A. Based on the statements of these physicians, it is their concerted medical opinion this man should be able to return to work. Based on examination of other patients with similar types of conditions over the past many years I would professionally think this man should be able to return to work.

Examiner: Let me point out one thing, Mr. Tinsman, that is getting pretty close to the $65 question that I have to answer and while I am permitting you to examine, I am not going by the doctor's conclusion—that's what I have to essentially determine.

[fol. 158] Counsel: Let me ask you a couple other questions. You said, based on all of Dr. Morales' reports and his opinion, he stated he felt the man would be able to go back to work—correction, wouldn't be able to go back to work, he felt the man was totally and permanently disabled.

Dr. Leavitt: This is correct but Dr. Morales has no objective findings to document this particular statement.

Mr. Tinsman: Let's talk about objective findings and subjective findings. Isn't it true that many times a patient will continue to complain and a doctor will be unable to find any objective findings and that the doctor will continue to treat that patient even though he is unable to find objective findings?

Dr. Leavitt: Are you asking me if that is what I would do?

Mr. Tinsman: Isn't this common medical practice?

Dr. Leavitt: Well, in a limitation of time. I don't think that one would continue from year to year, no.

Mr. Tinsman: Well muscle spasm of course is objective finding, isn't that correct?

A. This is an objective finding—is muscle spasm.

Q. Dr. Morales found muscle spasm, this is something that comes out involuntarily does it not?

A. One has no control over it, no.

Q. When we talk about various injuries, I think this is one of the things that doctors say a man may or may not have objective findings and may or may not produce an ability to work. Isn't that one of the definitions of—[fol. 159] Dr. Leavitt: I think we are looking here at information that has been submitted as exhibits which I have read as to what is the objective information that would indicate the degree of disability that relates to whether or not this man is functionally able to resume productivity in an ordinary day, and those findings are minimal.

Examiner: Mr. Tinsman, I have refrained from breaking in. I don't want to appear to cut you off. I follow the trend of your questioning but I think you are in a field of asking the doctor—to asking a question subjective versus objective. That's the weight that you give the evidence and I think you'll agree with me that is something I have to pass on myself.

Q. Even though you say electromyelograms that is only 80 to 85 percent accurate this means that sometimes there is false positive and false negative, isn't that correct?

Dr. Leavitt: Yes, and this is 10 to 15 percent more accurate than a myelogram which was also negative, so you have two negative tests which would indicate whether or not this man did have—

Q. Isn't it true though you have known of cases where they have had both a negative electromyelogram and a negative just plain myelogram and later on—

A. Certainly one would find a ruptured intervertebral

disc but surgically they didn't find this, according to Dr. Munslow's report.

Q. Dr. Munslow, I don't know what he found, I wasn't there.

Dr. Leavitt: No, but I would assume from the description of the surgical procedure of the report he submitted—medical information, he was there, he did do it. I would like to state one particular point. I have been personally professionally 20 years of my professional life in the restoration of individuals who have had degrees [fol. 160] of "disability" to being a productive tax paying citizen in our communities and this is what I am doing academically as well as professionally and this is why I think it is important that we look on an individual who has a disability emotionally and physically as something that is positive, that we try to help this individual to become productive recognizing these facts so that he in himself can in turn take care of his family unit and be responsible to himself and his family.

Mr. Tinsman: What you are saying is basically there are certain people that no matter what happens to them, if they are in a wheelchair or their legs cut off, some people can go back and properly manage and earn a living no matter what the disability?

A. I have an amputee now with all four extremities off who is earning a good living.

Mr. Tinsman: That's correct but it depends not only on the physical limitations but also on the mental factor and emotional factors of the particular person?

A. Again, the mental factor has a degree of disability same as organic. Those cases; from the information submitted here this man is not disabled emotionally or physiologically, totally and permanently.

Q. From what you told us, though doctor, I think it's fair—

Dr. Leavitt: I'm trying to interpret these reports.

Mr. Tinsman: From what you say, there is no one totally disabled if given proper care, even quadriamoutee he is not totally and permanently disabled?

A. For the job he is doing now, no.

Counsel: I think that's all.

Examiner: I think at this time we will take the testimony of Mr. Pool.

* * * *

[fol. 173] Examiner: All right sir. Mr. Tinsman, we have this sketch—explanation, which Dr. Leavitt has prepared at my request. Before I admit it I would like for you to examine it and see if you have any objection.

Examiner: (continuing) This will be marked exhibit 27 and admitted into evidence.

* * * *

[fol. 175] (This hearing closed at 11:50 a.m., March 31, 1967)

CERTIFICATION

I have read the foregoing transcript and hereby certify that it is a true and complete record of the hearing.

/s/ Irene B. Greene
IRENE B. GREENE
Hearing Assistant

Pedro Perales, Jr., C1-W/E
465-38-6398

EXHIBITS

Exhibit No.	
1.	Claimant's application for disability insurance benefits filed 4/20/66
2.	Claimant's application for social security account number, 6/16/44
3.	Report of disability interview dated 5/12/66
4.	Earnings record certified 5/6/66
5.	Copy of letter of denial to claimant dated 6/16/66
6.	Claimant's request for reconsideration, 7/25/66
7.	Continuing disability contact sheet, 7/25/66
8.	Notice of reconsidered determination to claimant dated 10/20/66
9.	Disability determination approved 10/12/66
10a-f.	Copy of hospital report furnished by Nix Memorial Hospital, San Antonio, Texas, covering hospitalizations on 11/21/65, and on 1/19/66
11a-b.	Medical report signed Max Morales, Jr., M.D., for period 4/13/66-5/27/66
12a-d.	Copy of hospital report from Santa Rosa Hospital, San Antonio, Texas, for period 4/15/66-5/2/66
13a-c.	Report of consultative examination by John H. Langston, M.D., on 5/25/66
14a-b.	State Department of Public Welfare Report of Physical or Mental Impairment, dated 7/23/66
15a-c.	Narrative medical report addressed to Mr. Richard Tinsman, Attorney at Law, San Antonio, Texas, dated 7/17/66, signed Max Morales, Jr., M.D.
16a-c.	Report of consultative examination dated 8/30/66 signed James M. Bailey, M.D.

EXHIBITS—Continued

17a-b. Medical comments by Howard Moses, M.D., Consultant in Neurology, BDI, dated 10/11/66

18a-c. Medical report, including EMG report, dated 12/23/66, from Dr. Langston

19. Professional qualifications of following physicians: James M. Bailey; John Harold Langston; Howard Moses; Max Morales, Jr.

SUBMITTED DURING ORAL HEARING

20. Physical Therapy Progress Notes, Baptist Memorial Hospital, 215 Camden Street, San Antonio, Texas, dated 12/17/66

21. X-ray examination of Thoracic-Lumbar Spine & Sacral—Lumbar Spine, dated 4/24/66

RECEIVED SUBSEQUENT TO ORAL HEARING

22. Claimant's sworn affidavit, notarized 3/1/67, in regard to his trip to Corpus Christi, Texas, in 2/66

RECEIVED IN EVIDENCE DURING ORAL HEARING ON March 31, 1967:

23. Letter to Mr. J. C. Pool, vocational consultant, dated 3/9/67, from the hearing examiner

24. Letter to Lewis A. Leavitt, M.D., medical advisor, dated 3/13/67, from the hearing examiner

25a-1. Reports, Texas Employment Commission, Employee Insurance Claims Division, Austin, Texas

26. Medical report, narrative summary on claimant, dated 5/3/66, by Morris H. Lampert, M.D.

27. Diagram of EMG potentials by Dr. Lewis A. Leavitt

27a. Medical report, 2/1/65, Dr. Ralph A. Munslow, M.D., to Mr. Gordon Cook

EXHIBITS—Continued

28. Medical report, 1/3/65, by Dr. Munslow, to Mr. Gordon Cook

29. Medical report, 11/22/65, by Dr. Munslow, to Dr. Brad Oxford

30. Medical report, 11/12/65, by Dr. Munslow, to Mr. Gordon Cook

LIST OF EXHIBITS

AC-1. Medical Report by Coyle W. Williams, M.D., dated 12/28/66.

AC-2. Judgment Number, F-182,668, 131st Judicial District Bexar County, Texas

EXHIBIT No. 5

[DHEW Emblem]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

Give Account No. 465-38-6398
When Writing About Your
Application to:
Social Security District Office
San Antonio, Tex. 78204

Jun. 16, 1966

Mr. Pedro Perales, Jr.
618 Avenue A
San Antonio, Texas 78207

Dear Mr. Perales:

We have studied your application under the disability provisions of the Social Security Act and find that you are not eligible to receive disability insurance benefits or to have your social security record frozen. Therefore, it has been necessary to deny your application.

Under the law, to be eligible for disability benefits or for the disability freeze, a person must meet both an earnings and a disability requirement. To meet the earnings requirement a person must have social security credits for 20 calendar quarters (5 years) of work during a 40-quarter (10-year) period ending in or after the calendar quarter in which he became disabled.

To be considered disabled for social security purposes, a person must be unable to engage in any substantial gainful activity due to a medical condition which has lasted or can be expected to last for a continuous period of at least 12 months. His condition must, however, be such as to make him unable to work not only at his usual occupation but at any other substantial gainful work con-

sidering his previous training and work experience. Whether or not the condition in a particular case constitutes a disability is determined from all the facts of that case. The decision on your claim was made by the Social Security Administration on the basis of an evaluation by a disability examiner and a physician in an agency of the State in which you reside.

We find that although you do meet the earnings requirement you do not meet the disability requirement. In reaching this determination, we considered how much your condition has affected your ability to work. After carefully studying the record in your case, including the medical evidence, and considering your statements, age, education, training, and experience, we find that your condition is not disabling within the meaning of the law.

No benefits may be paid to the wife, husband, or child unless the wage earner or self-employed person is entitled to disability insurance benefits.

Definitions of disability are not the same in all government and private disability programs. Government agencies must follow the particular laws which apply to their disability programs. Therefore, a finding by a private organization or another government agency that a person is disabled would not necessarily mean that he meets the disability requirement of the Social Security Act.

According to the amounts credited to your social security account at the time you filed your application, you will continue to meet the earnings requirement for disability purposes until September 30, 1970. If your condition should get worse before this date and prevent you from doing any substantial gainful work, contact your social security district office about filing another disability application. Any additional earnings which may be credited to your account after the time you filed your application may, of course, extend the date given above.

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration you must request it not later than

6 months fro
any such req
trict office. I
submit it wi
leaflet 858 fo
the determin

te of this notice. You may make
gh your local social security dis-
al evidence is available you should
request. Please read the enclosed
planation of your right to question
e on your claim.

This notice
is not a dec
payable at a
will be pay

nly your disability application. It
whether old-age benefits will be
hether survivors insurance benefits
event of your death.

If you have
get in touch
call in pers

ions about your claim, you should
district office shown above. If you
take this notice with you.

Sincerely yours,

LESTER O. WEBER, Chief
Evaluation and Authorization
Branch

Enclosure

OASI-858
bhh 28 6

EXHIBIT No. 8

[DHEW Emblem]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION

Baltimore, Maryland 21241

DI:R:3L
Account No. 465-38-6398
Date October 20, 1966

NOTICE OF RECONSIDERATION DETERMINATION

Mr. Pedro Perales, Jr.
618 Avenue A
San Antonio, Texas 78207

Dear Mr. Perales:

Upon receipt of your request for reconsideration, we had your claim reevaluated by a physician and a disability examiner in the State agency which works with us in making disability determinations. All the evidence in your case has been carefully evaluated; this includes the medical evidence and the additional information received since the original decision. This new evaluation was then independently reviewed in the Social Security Administration. On the basis of the evidence, and considering your age, education, training and work experience, it has been determined that the denial of your application for disability insurance benefits is proper under the law.

To be considered disabled for social security purposes a person must be unable to engage in any substantial gainful activity due to a medical condition which has lasted or can be expected to last for a continuous period of at least 12 months. His impairment must be so severe as to prevent him from engaging not only in his usual occupation but also in any other kind of substantial gain-

ful work, considering his age, education and work experience. This inability to work must exist at a time when another requirement, called the earnings requirement, is met.

You state that you became unable to work in September 1965, at age 33, due to your back injury. Your work record indicates that you have been employed as a truck-driver and general office worker.

The medical evidence, including the report of your physician and the reports of special examinations, discloses that your back condition was surgically treated in November 1965. Subsequent physical examinations fail to reveal any nerve or bone impairment. It is further shown that your ability to sit, stand and walk is not seriously impaired. Although you may be nervous and concerned about your health, the evidence does not reveal any impairment of your ability to think, reason, remember and understand. Therefore, it has been determined that your condition is not so severe as to prevent you from doing the types of work which are consistent with your experience and background.

In making the decision in this case very careful consideration was given to the conclusion of Dr. Morales that you are unable to work. We and the State agency value the evidence of the applicant's attending physician very highly and are most reluctant to reach a decision which is not consistent with his judgment. However, in our program an independent determination must be made as to whether the person meets the requirements of the law and the regulations on the basis of the clinical findings of all examining physicians, results of laboratory studies, treatment given and response, as well as the individual's training and experience. In a case like this where judgments of physicians differ as to the effects of impairments, the decision must be based on the objective evidence presented.

According to the amounts credited to your social security account at the time you filed your application, you will continue to meet the earnings requirement for disability

purposes until September 30, 1970. If your condition should get worse before this date and prevent you from doing any substantial gainful work, contact you social security district office about filing another disability application. Any additional earnings which may be credited to your account after the time you filed your application may, of course, extend the date given above.

We hope this satisfactorily explains the reason for the determination in your case. If you believe that the reconsideration determination is not correct, you may request a hearing before a hearing examiner of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 6 months from the date of this notice. You should make any such request through your Social Security District Office, San Antonio, Texas 78204. Read the enclosed leaflet BHA-1 for a full explanation of your right to appeal.

Sincerely yours,

C. C. HALL, Chief
Reconsideration Branch

Enclosure:

BHA-1

cc:

District Office, San Antonio, Texas 78204
VCalandriello:sls 10-17-66

NIX MEMORIAL HOSPITAL

SAN ANTONIO, TEXAS

MON. | TUES. | THURS. | X FRI. | SAT. | SUN.

NAME: PERALES, MR PEDRO JR	TELEPHONE: CA 6-6779	ROOM #: 2024	TRANS. TO:	CASE NO.: 271686	
ADDRESS: 618 AVENUE A --- CITY	CITY	STATE	RATE: 20.00	RATE	S W D S: H
ARRIVED BY: AMBULATORY	DATE: 1-13-66	HOUR: 2.30PM	DISCHARGED:	STRETCHER WHEEL CHAIR AMBULATORY	DATE: 1/25/66 HOUR: 2:30 PM
PHYSICIAN: R A MUNSLOW	PEDIATRICIAN	BIRTH PLACE: TEXAS			RELIGION: CATH
PAYING: YES	WHEN: 10-22-65	WHAT NAME: SAME	DATE OF BIRTH: 1-3-32	AGE: 33	SEX: RACE: WHITE SERVICE: ORTH
NEXT OF KIN: MRS OLGA PERALES	RELATION: WIFE	ADDRESS: SAME	DAY		LAB. #: SURG
PERSON RESPONSIBLE FOR THIS ACCOUNT: COMPENSATION	RELATION	REL. ADDRESS			REL. TELEPHONE
OCCUPATION	EMPLOYER	ADDRESS			TELEPHONE
PATIENT'S OCCUPATION: TRUCK DRIVER	EMPLOYER: JIM WALTERS CORP	ADDRESS: HWY 90 -EAST			TELEPHONE
HOSPITAL INSURANCE: CONTINENTAL CASUALTY --COMP---	INSURANCE CO.	POLICY NO.			GROUP NO.: MO 1-2343
Name of Blue Cross and/or Blue Shield Plan	GROUP NO.	CONTRACT NO.	EFFECTIVE DATE	Subscriber / Dependent	Family Member / Comprehensive Coverage
INSURED OTHER: YES	DATE: 9-29-65	WORKING FOR WHOM: JIM WALTERS CORP	ADDRESS: HWY 90 -EAST		MAIDEN NAME
BANK NO.	SOC. SEC. SECURITY NO.	INFORMANT: OLD RECORD	ADMITTED BY: JR) LIBBY		

Provisional Diagnosis (to be completed within 24 hours after admission):
Sev Post. Pain.

On admission, patient or qualified person must sign authorization for Medical and/or Surgical Treatment on reverse side

CODE NO.

Final Diagnosis:
Neuritis, brachial, mild

Secondary Diagnosis or Complications:
—

Operation:
—

CAUSE OF DEATH _____ AUTOPSY: ☐ YES ☐ NO

CONSULTATION WITH _____

DIED: ☐ UNDER 48 HRS. ☐ OVER 48 HRS. SIGNED _____ M.D., ATTENDING PHYSICIAN

BY SHEET (C) (D)

EXHIBIT NO. 10-F

NIX NIX NIX

Form No. 7

Nix Memorial Hospital

PERSONAL HISTORY

Record No.
Room
Date

Name Pedro Perales Age Service of Doctor

(Give Chief Complaint, Family History, Previous Illness, Menstrual History, Social History, Present Illness)

(Patient unit not transcribed)

Initial Visit

Has continued to complain of pains throughout back, neck, head, legs & arms — especially on the strength of the fact residual pain from left ear trouble. I suggest Dr. is admitted to evaluate & to withdraw Dyg.

EXHIBIT NO. 10 E

NIX NIX

Form No. 10

NIX MEMORIAL HOSPITAL
X-RAY REQUISITION

No. 91588 Record No. _____

Name Perales, Mr. Pedro Age _____ Sex M Room 2024

Clinical Diagnosis _____

State definitely the examination desired Repeat Myelogram

Attending Physician Dr. R. Munslow

Roentgenological Findings:

REPEAT MYELOGRAM:
A repeat study of the entire spine, demonstrates most of the previously injected Pantopaque to be in the subdural space in the lumbar region. Only approximately 1 1/2 to 2 ccs., move with change in position of the patient. No appreciable Pantopaque is seen in the dorsal region or cervical area. The irregularity in the contour of the opaque media, have little or no significance because the fact most of this opaque media is in the subdural or epidural space. The possibility of arachnoiditis must be considered.

FEO'N:fp

Date 1/20/68

R O'Neill M.D.
Roentgenologist

EXHIBIT NO. 10d

164

Pedro Perales
465-38-6391

NIX

NIX MEMORIAL HOSPITAL
SAN ANTONIO, TEXAS

NAME		TELEPHONE	ROOM	TRANS TO	CASE NO.
PERALES, MR PEDRO JR		CA 6 -6779	2026		270087
ADDRESS	CITY / STATE		RATE	RATE	S M W D S
618 AVE A			19.00		M

ARRIVED BY	DATE	HOUR	DISCHARGED	DATE	HOUR
AMBULATORY	11-21-65	1:52 P M		12-4-65	1:25 PM

PHYSICIAN	PEDIATRICIAN	DIAGNOSIS	RACE	RELIGION
R A MUNSLOW	B OXFORD	PROTRUDED LUMBAR DISC	TEXAS WHITE	CATH

FOR DR. PARKER	ADMITTED	WHAT NAME		DATE OF BIRTH	AGE	SEX	SERVICE
	10-22-65	SAME		1-3-32	33	M	NEURO

NOTIFY	RELATION	ADDRESS	DAY	LAB. #?
MRS OLGA PERALES	WIFE	SAME		SURG

PERSON RESPONSIBLE FOR THIS ACCOUNT	RELATION	RES. ADDRESS	RES. TELEPHONE
COMPENSATION			

OCCUPATION	EMPLOYER	ADDRESS	TELEPHONE
TRUCK DRIVER	JIM WALTERS CORP	HWY 90-EAST	

HOSPITAL INSURANCE	INSURANCE CO.		GROUP NO.
CONTINENTAL CAS. (COMP)	19 MAJESTIC BLDG.	CA 5-7651	

Name of Blue Cross and/or Blue Shield Plan	GROUP NO.	CONTRACT NO.	EFFECTIVE DATE	Subscriber ☐ Dependent ☐	Family member ☐ Comprehensive Coverage ☐

INJURED ON THE JOB	DATE	WORKING FOR WHOM	ADDRESS	MAIDEN NAME
YES	9-29-65	JIM WALTERS CORP	SAME	

CASE REF.	SOCIAL SECURITY NO.	INTERVIEWED	ADMITTED BY
		OLD RECORD	JR) ROTHROCK

Provisional Diagnosis (to be completed within 24 hours after admission):
PROTRUDED LUMBAR DISC

On admission, patient or qualified person must sign authorization for medical and/or surgical Treatment on reverse side

Final Diagnosis:
Herniated nucleus pulposus Lumbar

CODE NO.

Secondary Diagnosis or Complications:

Operation:
Laminectomy, partial

CAUSE OF DEATH _____ AUTOPSY: ☐ YES ☒ NO

CONSULTATION WITH Dr. Sug - (illegible) - [illegible]

ED: ☐ UNDER 48 HRS. ☐ OVER 48 HRS.

SIGNED _____ M.D., ATTENDING PHYSICIAN

SUMMARY SHEET (OVER)

EXHIBIT NO. 10

NIX

NIX MEMORIAL HOSPITAL
OPERATIVE RECORD

270087

Record No.
Room 2026
Date 11-23-65

Name Perales, Pedro Jr. Age Service of Doctor Hunslow

PRE-OPERATIVE DIAGNOSIS

Probable protruded intervertabral disc.

POST-OPERATIVE DIAGNOSIS

Nerve root compression syndrome, left.

OPERATION:

Hemilaminectomy, L5, left.

OPERATIVE PROCEDURE:

The patient anesthetized and prepared and hyperflexed in the frame. Midline incision is made in upper border of the spine of L4 downward in the midline to the upper sacrum. Dissection is carried down and in the subperiosteal space exposing the interspaces at L4-5 and L5 S1. At each interspace, partial laminectomy is carried out on the left and of the bone adjacent to the interspace followed by resection of the intervening ligament inorder that the interspace could be thoroughly explored both by inspection as well as by palpation. In each instance, there was no protrusion of the disc identified. Further resection downward over the sacrum is carried out inorder that we do not overlook the fragment of disc that may have extruded extra-durally in this space but none is found.

There seems to be more tightness of structures particularly of the roots in the dural sac and the lumbar area than one usually encountered. It is felt that this is the situation representing the root compression syndrome, the exact mechanics of which is not apparent. It is felt that for this reason that hemilaminectomy of the left L-5 would afford the patient additional decompression and this is carried out. After this had been done the dural sac bulges upward in a more normal position. Repeat inspection through the intact dura reveals no evidence of an intradural mass. Likewise the anterior aspect of the canal appears normal. Accordingly, the procedure is discontinued after closure of the muscles, fascia, and the subcuticular layer being approximated with interrupted catgut and continuous dermol suture used to close the skin.

The patient withstood the procedure well and is sent to the recovery room in good condition.

Signature of Surgeon R. A. Hunslow

R. A. Hunslow, M.D./cc 11-23-65
cc: Hunslow

EXHIBIT NO. 104

NIX

Form No. 7

Nix Memorial Hospital

PERSONAL HISTORY

Record No. 270087

Room 2026

Date

Name Perales, Pedro Age Service of Doctor Munslow

(Give Chief Complaint, Family History, Previous Illness, Menstrual History, Social History, Present Illness.)

INTERVAL HISTORY -

This man was discharged from the hospital just a few days ago to try it at home to see if he could recover further from his back pain. This is not possible and in fact he got worse and he enters the hospital at this time for definitive surgery contemplated previously

PE & FH - remain otherwise unchanged.

(Use Both Sides)

EXHIBIT NO. 10

Form Approved.
Budget Bureau No. 72-R510.7

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DATE OF THIS REQUEST

MEDICAL REPORT
(General)

Notice to Physician:
Please include sufficient details of history, physical and diagnostic findings, clinical course, therapy and response to enable a reviewing physician to make an independent determination as to the severity and duration of the impairment.

(1) IDENTIFYING INFORMATION (To be completed by Requesting Office)	PATIENT'S NAME: Hedrd Herald	DATE OF BIRTH: 1/25/32	SOCIAL SECURITY ACCOUNT NO.: 465-38-6374
	WAGE EARNER'S NAME (If different from patient)	ADDRESS OF REQUESTING OFFICE: 30 [illegible] Clinton, Co	

I. HISTORY: (Give complaints, past and present, clinical course, including therapy and response.)

Back injury lifting a heavy wt. on Nov '65 - Hospitalized & had Myelogram by Dr. Munslow in Nov '65. Since then the Pt. has had a severe low back pain - persistent & refractory To Treatment which prevents the Pt. from being able To Work.

Dx ① Back Sprain - Moderately Severe - hems to Sacral Spine

② Ruptured Disk Not completely ruled out

EXHIBIT NO. 11B

DATE OF INJURY OR FIRST SIGNS OF ILLNESS	DATE IMPAIRMENT PREVENTED WORK	DATE YOU FIRST EXAMINED PATIENT	FREQUENCY OF VISITS	DATE OF LAST EXAMINATION
Nov '65	Nov '65	4-13-66	Weekly	5-27-66

FORM SSA-826 (9-65)

II. PHYSICAL FINDINGS: Please show all pertinent findings (with dates).

HEIGHT	WEIGHT

11. PHYSICAL AND OTHER FINDINGS: (Continued)

(OVER)

III. LABORATORY AND SPECIAL STUDIES: Give results with dates. (Hemoglobin, Hematocrit, Sedimentation rate. Cerebrospinal fluid, Blood chemistry, Urinalysis, Sputa (smear, culture), Serology, X-rays, Electrocardiogram, Liver function, Bronchoscopy, Myelogram, Biopsy, Pulmonary function, Renal function, Psychometric, etc.)

IV. DIAGNOSES:

1. Brain Trauma - Lumbo Sacral Sprain moderately severe
2. Herniated DISK
3. not ruled out.

REPORTING PHYSICIAN'S NAME AND ADDRESS	SIGNATURE	TITLE
Ray Moreber M.D 1600 Columbia	Ray Moreber M.D TELEPHONE NUMBER ME 5 6131	DATE 6-7-66

EXHIBIT NO. 11

HOSPITAL
CO. TEXAS

SHEET

9-25

Discharge Date 5-2-66 A.M. No.

Code No.

Diagnosis or Complications

Diagnosis Only Died

Autopsy: Yes No

BEST COPY

...ved the complete medical record on 5-2-66

...M.D., Attending Physician

SUMMARY SHEET

9 19 CS

...M PEDRO PERA... ...
DR. P. PERALES ...

P-52 (Rev 2/62)

SANTA ROSA MEDICAL CENTER
"SAN ANTONIO" TEXAS

PROGRESS RECORD

DATE

4-15-66 Claim Pt Pain Lt Arm Lt Shoulder
Lt Leg Pain & Pains Pain in
Chest Wall —

M Morales

4-16-66 Pt has a Pain Pill pat & Pt has
Pain in the chest wall & Lt
Leg at night Lt Leg hurt &

4-18-66 Still complains of Pain in Rt arm &
radiates up to the Shoulder - neck & head
also complains still of Pain in Rt leg
Pain in Hips & in L-5 area of Spine
will have Dr. Munslow to evaluate &
of his Spine.
will try on Anti-Rheumatoid & Pain
3-4 days to see if we can get any response.

M Morales

4-17-66 Severe Epigastric pain in Thorax -
Spine, Unable to Take an
of Pain. Unable to get into bed. will
Dr. Lewis Keller to see it there

4/19/66 Sam resting on chair at
bedside. Unable to
complained of severe pain in
attempt at passing

M Morales

EXHIBIT NO.

SANTA ROSA MEDICAL CENTER
SAN ANTONIO, TEXAS

PROGRESS RECORD

to straighten knee. Pt complained of severe pain on attempted passive movements of all upper extremity joints and complained of severe pain on straightening upper lumbar spasm evident on palpation in thoracic-lumbar region. Perceptual impairments & the pt seems slow in most areas. Needs work more with legs. Was able to get out of bed & ambulate with minimal assistance.

Pt at beg treat complained of pain when pt legs were straightened & turned leg to partial flexion but would not attempt bed to knee & pain increase. Was able to move left upper extremity freely.

Evaluation would appear to be primarily muscular & ligamentous involvement. If this continues it would probably be advisable to obtain electromyography on this patient.

L. M. Helfer (nursing)

With Pt. Claims he is still unable to walk without severe discomfort or limitations. Will get some for Pt.

Pt left out of bed last night. Now has severe pain in back also developed Nausea. Feels very weak. Informed Dr. Jones of this.

M. [illegible], JR.
DR

66-7277

909-4

EXHIBIT NO. 12

SANTA ROSA MEDICAL CENTER
SAN ANTONIO, TEXAS

PROGRESS RECORD

DATE

2/5/66 Patient has been irritable and complaining of pain since last visit a few days ago. He repeatedly pulls out I.V. and foley catheter and complains of marked pain in rt shoulder, neck, and low back. He is able to perform neurological test on extremities adequately even though they are done grossly. His gross motor are well retarded. Reflexes are equal and active except for the left achilles which is less brisk than on the right.

He has been requesting pain R to 3 hrs advised exercising rt arm, changing position in bed, and avoiding inactivity. He would also be advisable to try him on Librium.

Dr. Wm Shaw
L. M. Helfer, (M.D.)

2-7-66 Orders
Notified pt. Changes as ordered
M. Morales

2-8-66 Discharged c Rx - Home to be F/U in Out Pt. Dept. Call Discharge Nurse
M. Morales

Discharge Note
2-8-66 Pt. has been complaining of back pain for several days. Pain is relieved by pain pills. Pt. has had pain in back, neck & extremities. Has requested to go home. Discharged this morning. Pt. will follow up in Out Patient Dept. in 1 week.
M. Morales

... JOHN PARKER, JR.
... M.D.

902-4 EXHIBIT NO.

SAN ANTONIO BONE & JOINT CLINIC
H & S TOWER
730 N. MAIN
SAN ANTONIO, TEXAS 78205

ORTHOPEDIC SURGERY
JOHN H. LANGSTON, M. D.
DOYLE W. WILLIAMS, JR., M. D.

TELEPHONE CA 6-0311
IF NO ANSWER DIAL CA 7-0331

May 31, 1966

Charles O. Bialock, Director
Division of Disability Determination
201 East 11th St.
Austin, Texas

RE: Pedro Perales, Sr.

Dear Mr. Bialock:

At your request, I examined Mr. Perales in my office on 5/25/66 because of pain in the low back area. He dates the onset of his illness to September, 1965, at which time he lifted a 250 pound object. He suffered with back pain; in November he had a disc operation by Dr. Munslow. He has not felt as though he was improved following this surgery and continues to complain of pain in the back as far as the right thigh with radiation laterally. He has been on crutches or cane ever since that time. He walks around the block or around his house and finds that his legs are swollen and his arms are getting weak. Also, his legs are turning purple lately.

PAST HISTORY: He was a truck driver and was quite healthy before his accident. The only operations he has had in the past have been a tonsillectomy.

EXAMINATION: Height - 5' 11"; weight - 212 pounds. This 33-year-old big physical healthy specimen is obviously holding back and limiting all of his motions, intentionally. He walks very slowly, holds his body almost rigidly, and needs his wife to care for him by helping him get dressed and undressed. The examination of him is somewhat difficult because he will

EXHIBIT NO. 13c

not do such motions as bending forward more than 10 or 15 degrees. He cannot stoop, nor will he try. He cannot squat. His upper extremities, though they are completely uninvolved by his injury, he holds very rigidly as though he were semi-paralyzed. His reach and grasp are very limited but intentionally so. When asked to squeeze my hand very tightly, the most he could manage was just a feeble grip on both sides. He walks somewhat bent forward, holding his body rigidly as stated before, seeming not to want to move not only his back, but neither the lower extremities, nor the upper extremities at all. When each arm and limb are tested to their range of motion, there is no restriction in the upper extremity, neither on the right nor on the left. Hip motion, knee motion and ankle motion are not limited when tested individually, but he will not allow straight leg raising beyond 30 or 40 degrees and complains of back pain all the while. However, when he is sitting, and the extended leg is flexed at the hip, one can almost approach 90 degrees.

Neurological examination is entirely normal to detailed sensory examination with pin-wheel, vibratory sensations, and light touch. Reflexes are very active and there is no atrophy anywhere.

He can walk on his toes and heels for a few steps, but he does this very hesitantly and unwillingly.

He has some additional complaints of leg swelling, and indeed, the legs are slightly edematous. No doubt because of his inactivity and sitting around in a chair or standing almost rigidly. Also, some of the muscles of the dorsal spine are slightly tender, but this I believe is due to his poor posture, and a very mild sprain thereof, which would resolve were he actually to get a little exercise and move.

X-rays of the lumbar spine reveal the presence of six lumbar vertebrae. That is, the first sacral segment has been lumbarized. There is evidence of Pantopaque in small quantity present in the lower lumbar spinal canal area. There is a minimal tilt of the upper lumbar vertebra to the right side on the AP film, but this may be postural rather than muscle spasm. Otherwise, no abnormalities of the lumbar spine are seen, the inter spaces are well preserved, and there are no pars defects. The interspace between L-6 and S-1 is understandably narrowed and does not in my opinion suggest any disease in this area. The inter space between L-5 and L-6 is remarkably well preserved.

ADDENDUM: During the testing of back motion when the previous operation area was palpated, there was no muscle spasm, but he complained of undue and unwarranted tenderness to palpation in this area. It corresponded roughly to the lower lumbar and sacral areas and was grossly exaggerated.

IMPRESSION: He may have a very mild chronic back sprain associated with

EXHIBIT NO. 134

the congenital anomalies as seen on x-ray, but it has been a long time since I have been so impressed with the obvious attempt of a patient to exaggerate his difficulties by simply just standing there and not moving - not even the uninvolved upper extremities. Thus, he has a tremendous psychological overlay to this illness, and I sincerely suggest that he be seen by a psychiatrist.

PROGNOSIS: He should have intensive physio-therapy in the form of active exercise, including walking, bicycling, and an all out attempt at conservative rehabilitation. Were he to follow this program, and were it to be effective, I would estimate the time necessary at about three to six months. This is also considering that he does not have any serious psychiatric disease, though he obviously does have a tremendous psychological overlay to his illness.

Sincerely,

John H. Langston, M. D.

JHL/bf

Exhibit NO. 13c

State of Texas
Dept. of Public Welfare
(1945 (Revised)
-52

STATE DEPARTMENT OF PUBLIC WELFARE
REPORT OF PHYSICAL OR MENTAL IMPAIRMENT

To: Dr.

Dear Doctor:

The patient named herein is the parent of children for whom an application for Aid to Families with Dependent Children has been filed.

From your report and collateral information which the Department will gather, we hope to reach a decision as to whether the examinee is sufficiently disabled (permanently or temporarily) to preclude him from engaging in substantial gainful employment for which he may be suited.

Your cooperation is appreciated.

Yours truly,

(Signature of Worker, Dept. Public Welfare)

P. O. Box 2410, San Antonio, Texas
(Address)

Mrs. Dorothy L. Ries, PA Worker
(Type Name)

IDENTIFICATION

Patient's Name: Pedro Perales, Jr. Sex: Male

Street: 613 Avenue "A" Town: San Antonio, Texas Date of Application: 1-9-46

Guardian, (if any): None Case No.: Funding

Date of Birth: 1-30-32 County: Bexar

Occupation, (Past and Present): truck driver- Past disabled at present Region No.: 10b

Applicant's Name: Pedro Perales Spouse's Name: Olga Perales

ITEMS BELOW ARE TO BE FILLED IN BY EXAMINING PHYSICIAN

BRIEF HISTORY:

Complaints referrable to unemployability: Back Pain

Brief History of Medical Impairment: Sept 23, '45 - Last back. While working & picking up 250 lb weight. Had Disk Surgery by Dr Rheystow on Nov 23, 45 - had ruptured disk removed - since then was in & out of the hospital many times with back pain - is unable to work b/c pain every day - complains of constant headaches

SECTION II - PHYSICAL EXAMINATION: Please note this is to be only a physical examination. No special studies (EKG, x-ray, CBC, etc.) are asked for or authorized. Please mark items you have found normal with the word "NORMAL." Please describe any deviations from normal. If additional space is needed, please record on an extra sheet.

Height: 5' 11" Ft. 3 In.; Weight: 220 Lbs.; Temp. 98; B.P.: Systolic 140 /Diastolic 82

Eyes - Vision: Right: Normal Left: Normal

Hearing: Right Ear: Normal Left Ear: Normal

Nose: Normal Throat: Normal

Mouth: Normal Neck: Normal

Lymphatic System:

Lungs: Clear

Heart: RSR - NSR

EXHIBIT NO. 4

Pulse: 82 Rhythm: Normal

Abdomen: Normal Edema: None Some Equality of ankles

Existence of Arteriosclerosis (Degree and where found): None

Normal

Kidneys: ...

Brain: None

Genito-Urinary: Normal

Rectal: Normal

Nervous System: (Paralysis, Sensation, Speech, Reflexes) ...

If hemiplegia, give time of last stroke and nature and degree of impairment, if any: ...

Other: ...

ORTHOPEDIC IMPAIRMENTS: Describe Has ruptured disk Kenworthy - has surgery and has failed to recover. Still has disabling back pain & weakness in lumbo-sacral spine.

MENTAL CONDITION: Complete only where there is evidence of mental impairment: Is there evidence of mental disease, emotional instability, or feeblemindedness? State which and give brief description: ...

If he has ever been committed to a Mental Hospital, give name and address and dates there: Name: ... Dates: ...

DIAGNOSIS: (1) Ruptured Disk - Lumbo Sacral Spine - Removed (Pt has not regained (totally disabled) Recovery.

Is patient capable of substantial gainful employment (Yes) ... (No) ...

If not able to engage in gainful employment, please give reason, comment on your general impression of the patient, what therapeutic and/or rehabilitative measures, if any, might significantly improve or possibly cure his condition so that he may again resume gainful employment? Rehabilitation TO Jobs ahead Pt. can remain Seated - also further orthopedic evaluation & Treatment

In your opinion treatment would significantly improve or cure his impairment? yes - Spine Surgery is necessary Pt has already had Spine Surgery - in a Pt. who has already had Spine surgery Prognosis NOT Known

In your opinion, when could he reasonably be expected to return to employment? ... (1 month, 6 months, 1 year, never, etc.)

If unable to work, will his health permit him to care for their children at home while his wife works? Yes

If so, please explain: ...

In your opinion, does he have both physical and mental capacity for training for another vocation if he is now incapacitated to follow his usual one/ones? Yes

Does patient know your diagnosis and recommendation for treatment? Yes

May your diagnosis, and/or treatment recommendations be shared with the patient? Yes

REMARKS: ...

PLEASE CHECK AND COMPLETE APPLICABLE STATEMENT:

☑ I hereby certify that the above information is based on a physical examination done at the request of the State Department of Public Welfare on (Date) 5-23-, 19.. and that it is true and correct to the best of my knowledge and belief.

☐ I hereby certify that the above information was taken from current existing records and that no physical examination of the patient was done for the specific purpose of this report. The last examination in the records upon which this report is based is dated: ..., 19..... The information herein is true and correct to the best of my knowledge and belief.

The payment is made on this claim for services rendered, the medical information becomes the property of the State Department of Public Welfare and may be used within the discretion of the State Department of Public Welfare for determination of eligibility for benefits from this Department and other governmental agencies and for rehabilitation services. Information will be furnished to other agencies only upon proper authorization from the patient.

EXHIBIT NO. 4a

Mary Morales, M.D.
1600 Culebra
San Antonio, Texas

Physician's Signature: Mary Morales M.D.

Date: 5-23-64

EXHIBIT No. 15

Max Morales, Jr., M.D.
Family Doctor

William Gonzalez, M.D.
Physician & Surgeon

Fabian Gomez, M.D.
Internal Medicine

C. E. Chapman, M.D.
Obstetrics & Gynecology

MORALES MEDICAL CLINIC
1600 Culebra Avenue
San Antonio, Texas 78201

August 17, 1966

Phones:
Day: [Illegible]
Night: CA 6-3336

Mr. Richard Tinsman, Attorney at Law
1907 National Bank of Commerce Bldg.
San Antonio, Texas

Re: Pedro Perales, Jr., 618 Ave. A, San Antonio, Texas

Dear Mr. Tinsman:

This narrative report is in reference to Mr. Pedro Perales, Jr., 618 Ave. A. I first saw Mr. Perales on April 13, 1966, when the patient gave me the following history:

Patient claims that while working for the Jim Walter Corporation in November of 1965 he suffered an injury to the lumbo-sacral region of the spine and subsequently was seen by Dr. Ralph Munslow and Dr. Oxford. Patient claims that he was hurt while loading some heavy weights of approximately 250 lbs. and that as a result he suffered a slipped disc in the lumbo-sacral region of the spine. Patient was then seen by Dr. Munslow, who examined him and diagnosed a slipped disc and a pinched nerve and referred him to Dr. Lampert, who then did a neurological evaluation. The patient was subsequently hospitalized at the Nix Hospital by Dr. Munslow, who

apparently did a laminectomy at the level of L-4 to -5 and S-1.

Patient claims that he is not completely sure of exactly what the extent of the surgery was at that time. Patient claims that since January of this year, after the operation, he has been unable to be himself again, has complained of numbness and swelling in the right arm, swelling of both feet, and pain in the low back region of the spine, centered above the lumbo-sacral region, which the patient claims is constant at all times regardless of what medication is taken. Patient claims that this pain is so severe it keeps him completely from pursuing any gainful employment, that he is unable to stand for any prolonged period of time, is unable to sit for prolonged periods, is unable to bend and pick up weights of any king. Patient has to walk in a very cautious manner, afraid of being jarred because of pain in the lumbo-sacral region of the spine.

Because of the multiplicity of complaints, it was determined that the patient should be admitted to the Santa Rosa Hospital for further work-up and evaluation. He was admitted to the general hospital at the Santa Rosa Medical Center on the 14th of April, 1966.

Physical examination at that time revealed a 34-year-old white male appearing quite robust, somewhat obese, in no great distress. The remainder of the physical examination was essentially normal except for the following significant findings: the examination of the back showed considerable muscle spasm in the lumbo-sacral region of the spine, especially centered in the paraspinal muscles. There was also muscle spasm found in the region of both sacro-iliac joints. There was a considerable amount of point tenderness in both these regions. The patient was found to be unable to stoop, or, on beinding over, was unable to bring his outstretched hands closer than about one foot from the floor. Patient was unable to hyperextend or flex the trunk to either side without a subjective complaint of pain. Rectal examination failed to reveal any significant findings.

X-rays taken at that time were as follows: dorsal spine —there was no fracture or localized bone or joint abnormality. The lumbo-sacral spine X-ray showed there were old laminectomy defects of the lumbar spine, L-4 to -5 and S-1, and a moderate amount of opaque material remaining in the spine from a previous myeolography. It was assumed that this previous myelography is the one that had been done by Dr. Ralph Munslow.

The patient was then treated with some deep heat and muscle stimulation, using the medcosonalator and some diathermy to this region. He was also treated with some tranquilizers, some muscle relaxants, some analgesics, and something for insomnia. The patient was treated for a short time and then was discharged to be followed on an out-patient basis. The patient was then seen on May 3, when he complained of pain in the lumbo sacral region of the spine, insomnia, nervousness, tension, anxiety, and a considerable amount of depression. The patient was then treated with some hypnotics for sleep and an analgesic which contained one grain of codeine.

He was seen again on a daily basis for two months, during which time he was treated with some injections of Depomedrol, given intramuscularly and into the region of maximum tenderness in the lumbo-sacral region of the spine. Treatments were continued in a most vigorous manner, using deep heat and muscle stimulation, using the medcosonalator to the area mentioned.

On May 16 the patient was still complaining bitterly of pain in the back and also complaining of swelling in the feet. At this time Diuril, 5 gr., was given daily. On the following day the patient was found to still have a considerable amount of low-back pain. He claimed that the pain had also radiated into the right thigh, down along the sciatic distribution. He claimed to get a sudden weakness and of being unable to stand steadily without the use of a cane because of fear of falling.

At this time patient was given a different type of codeine analgesic for relief of symptoms. He was seen daily, with a similar treatment given above. On June 23 the

patient was still complaining of a certain amount of weakness of the lower extremities and was considerably depressed. At this time Aventyl Hydrochloride, 25 mg. was given three times a day. Also Elavil, 10 mg. three times a day was added to his treatment.

The patient continued to be treated up until the present, being seen as frequently as every other day for treatment, using the deep heat of the ultra-sound head with muscle stimulation. On July 23 the patient claimed to have had no change at all and was still complaining of his old back pain and inability to work because of the back; that he was still very nervous and was complaining of headaches.
On August 12 he was still complaining of excruciating pain in the lumbo-sacral region, insomnia, numbness in the legs and weakness in the legs, which occasionally went out from under him causing him to fall.

Diagnosis in this case should be considered as crush injury to disc in the lumbo-sacral region of the spine resulting in either a ruptured disc or a slipped disc which was subsequently operated on by Dr. Ralph Munslow. Since the operation, the patient has not made a complete recovery; on the contrary, the patient continues to complain as bitterly now as he did prior to surgery.

Since I started seeing this patient on April 13, I have had occasion to see and talk with him over 30 times. During this period and with this number of visits, I have become thoroughly convinced that this man is not malingering. I am completely convinced of his sincerity and of the genuine and truthful nature of his complaints. From my own observations and from physical examination, it is my considered opinion that this patient has indeed an injury to the lumbo-sacral region of the spine which has not been corrected by surgery. My opinion is that the injury sustained is of a permanent nature and that as things presently stand, the patient is totally, completely, and permanently disabled. It is my considered opinion that this patient in the condition in which he finds himself at this time would not be able to con-

tinue gainful employment as a common laborer. Inasmuch as this patient has had previous surgery to the affected area, I do not know that further surgery would have anything to offer him, and have told him that about the most I could offer him would be a support belt to help relieve the symptoms, by the use of a walking cane, and analgesics for relief of the symptoms.

Should you desire any futrher information on this case or like any specific item clarified or enlarged upon, please do not hesitate to let me know.

Enclosed please find statement in the amount of $550.00, which represents the total for services rendered, including this narrative report.

Sincerely yours,

/s/ Max Morales, Jr., M.D.
M. MORALES, M. D.

MM:lw
cc: Mr. Anthony J. Ferro
812 San Antonio Savings Bldg.

EXHIBIT No. 16

[Received Sep. 2, '66, Disability Determination Division OASI, Austin, Texas]

JAMES M. BAILEY, M. D.
359 East Hildebrand
San Antonio, Texas 78212

AC 512 TAylor 4-9408
August 30, 1966

Charles O. Blalock, Director
Division of Disability Determination
Texas Education Agency
Austin, Texas

RE: Pedro Perales, Jr.

Dear Sir:

A 34 year old married male, father of three children who is a truck driver and laborer. In September 29, 1965, while lifting, he "suddenly had a pain in his back, was paralized for five minutes, dropped a bundle weighing 70 pounds which he had lifted." He had pain the rest of the day and on the following day. He contacted a physician and received treatments in the form of physical therapy, heat lamps and medicines. Three weeks of hospitalization and traction was also used. After two weeks out of the hospital, he returned in November of 1965 to be operated upon. After two or three weeks in the hospital he was discharged. He has had swelling of his feet and neck and numbness and weakness in his legs. He has very sharp pains in his back and headaches which at the time required an additional three weeks stay in the hospital.

Mental status examination reveals a rather stocky male weighing 220 pounds. He walks slowly and stooped and uses a cane. He is oriented as to time, place and person. Memory for remote and recent events is good. Speech is logical and coherent. He has a tendency to studder.

This is more pronounced when people speak to him sharpley. Patient can read and write a small amount. He attended the third grade in school and quite because he had to help the family feed the other children. Abstract thinking is poor, but apparently based on limited intellectual endowment and lack of education. Simple proverbs are handled poorly.

The patient reports that he feels depressed all of the time. He yells at his wife and children usually using a great deal of profanity. (Patient relates what he says to them.) He has difficulty getting to sleep but does not know why. (A law suit is pending under the Workmens Compensation Act.) Mood is of continuous anger and feelings of being put upon. He is extremely hostile particularly to Doctors, relating that he will get well even if he has to go to Mexico or somewhere to find a Doctor smart enough to cure him.

Diagnosis:

Paranoid personality, manifested by hostility, feelings of persecution and long history of strained interpersonal relationships.

I do not feel that his patient has a separate psychiatric illness at this time. It appears that his personality is condusive to anger, frustrations, etc.

Sincerely yours,

/s/ James M. Bailey
JAMES M. BAILEY, M.D.

JMB/njb

IMPORTANT

Pedro Perales, Jr.	465-38-6398
Name of Patient	A/N Number

PLEASE ANSWER THE QUESTION LISTED BELOW AND RETURN THIS FORM WITH YOUR NARRATIVE REPORT AND PAYMENT VOUCHER.

In your opinion, would the patient be capable of handling monthly benefits which may be payable? ☒ Yes ☐ No

/s/ James M. Bailey 8/30/66
Signature Date

TEXAS EDUCATION AGENCY
Division Disability Determination
Capitol Station
Austin 11, Texas

EXHIBIT No. 17

BUREAU OF DISABILITY INSURANCE
Medical Consultant Staff
Texas

CASE DEVELOPMENT SHEET

Recon.—L
AN 465-38-6398
Pedro Perales, Jr.

Date Oct. 11, 1966

COMMENTS:

This 34-year-old, unemployed male truck driver with 3 years of education, alleges disability with onset date 9-29-65 because of low back pain.

The claimant alleges the onset of low back pain as the result of an injury in 9-65. He was apparently admitted to a hospital on a number of occasions, shortly thereafter. A neurological examination which would have confirmed the presence of nerve root compression and a satisfactory myelogram which would have demonstrated the presence of a herniated disc are not to be seen in the medical evidence. Nevertheless, the claimant had a partial laminectomy in 11-65, at which time of course no herniated disc was found and the surgeon was hard put to find a reason for operating on the claimant.

In a number of communications the claimant's private physician states that the claimant may have a back strain or ruptured disc but was unable to produce any objective neurological signs to support the presence of a disc. The claimant was admitted to a local hospital on many occasions for back pain with no fresh signs obvious.

In 5-66, the claimant was examined by an orthopedic surgeon who could find no evidence of orthopedic or neurological impairment. The surgeon was greatly impressed by the claimant's obvious attempt to exaggerate his diffi-

culties. He felt that the claimant may be wilful in his inability to perform certain tasks.

The claimant was seen by a psychiatrist in 8-66 who could find no severe psychiatric impairment.

The claimant's private physician who had seen the claimant on many occasions submitted a report in 8-66 in which he documented no objective evidence of nerve root compression, but documented a great deal of conservative and narcotic treatment for the claimant. He was unable to offer a satisfactory reason for the claimant's complaints but did submit a rather large bill.

In summary, although the claimant has complained of low back pain since an injury in 9-65 and he had surgery performed for reasons not quite apparent from the medical evidence, he has no objective evidence of severe orthopedic or neurological impairment. Certainly, he does not meet DISM listing 381.11.

/s/ H. Moses
HOWARD MOSES, M.D.
Consultant in Neurology, BDI

Form OA-D416 (4-66)

N O S TOWER
730 N. MAIN
SAN ANTONIO, TEXAS 78205

DEC 27 [illegible]

ORTHOPEDIC
SURGERY
ALBERT E. SANDERS, M. D.
JOHN H. LANGSTON, M. D.
COYLE W. WILLIAMS, JR., M. D.

[illegible]
DIVISION D.A.D.
AUSTIN, TEXAS

TELEPHONE
CA 6-9311
IF NO ANSWER
DIAL CA 7-6331

December 23, 1966

Charles O. Blalock, Director
Division of Disability Determination
Texas Education Agency - Capitol Station
Austin, Texas 78711

RE: Mr. Pedro Perales

Dear Mr. Blalock:

As you can see from the EMG report there is polyphasic slow firing motor unit potentials in the left anterior tibial and the right anterior tibial and right extensor digitorum brevis. But, the "very poor effort" is exactly what I found on physical examination and as you recall, not only was this poor effort shown in the lower extremities, but also in the upper extremities. In my report, I indicate that he should exercise, etc.; however, the best therapy would be for him to go to work immediately, which, on the basis of my original report and in light of the EMG, he should be able to do forthwith.

Sincerely,

John H. Langston, M.D.

John H. Langston, M. D.

JHL/bf
encl:

This is the old trouble and shoulder + brother-in sig misscantly now. J.L.

EXHIBIT NO. 18c

EXHIBIT No. 20

BAPTIST MEMORIAL HOSPITAL
215 Camden Street
San Antonio, Texas

Name: Mr. Pedro Perales
Doctor: Dr. Richard L. Mattson
Date: 17 December 1966

Hosp. No. _____
Room No. _____
Service: _____

PHYSICAL THERAPY PROGRESS NOTES

Referring Doctor John Langston, M.D. and Mr. Charles Blalock

Diagnosis

Electromyographic Study:

This man is sent for evaluation of back and leg pain that has been present for many months.

Needle electrode examination:

Of the left and right anterior tibialis muscles and right extensor digitorium brevis muscles revealed normal insertion activity with no fibrillations or fasciculations. The motor units were quite broad and polyphasic at times indicating some chronic or past disturbance of function in the nerve supply to these muscles. The motor units fired very slowly in their regular roots that were strongly suggestive of lack of maximal effort. This is the kind of finding that is typically associated with a functional or psychogenic component to weakness.

Needle electrode examination was also carried out in the left and right gastrocnemius muscles, the left and right peroneus longus muscles, the right vastus medialis, posterior tibialis, and hamstring muscles. In each of these the insertion activity was normal with no positive waves or fibrillations seen. No fasciculations were present. Again the motor units fired very slowly and only after

a great deal of coaxing and urging. Furthermore when simultaneous muscle testing was done while recording electrically there was a give-way component which corresponded to the irregular firing of the muscles. The appearance of the units was normal otherwise.

Impression: Some polyphasic units are seen in the distribution of L-4 and/or L-5 roots that suggest some old or chronic disturbance. There is no evidence of fibrillations or decreased number of units that would any active process effecting the nerves at present.
There was evidence of very slow firing of the motor units on voluntary effort and these were grouped at irregular firing pattern which is strongly suggestive of a psychogenic or functional component to the muscle weakness. Thank you for the consultation.

RHM/mb

RICHARD H. MATTSON M.D.

EXHIBIT No. 21

SANTA ROSA MEDICAL CENTER San Antonio, Texas

Patient Perales Jr., Pedro Room 929-4 Date 4/24/66

Doctor M. Morales Age 34 No. 419879

Examination Thoracic-Lumbar Spine & Sacral-Lumbar Spine

Address 618 Ave. A. Chart #66-9179 Status In-Pri

X-Ray Examination
Thoracic-Lumbar Spine & Sacral-Lumbar Spine

DORSAL SPINE:

No fractures or other localized bone or joint abnormality found.

LUMBO SACRAL SPINE:

Since last examination ten days ago, no appreciable change. Again no definite well localized significant appearing bone or joint abnormalities found. However, there are old laminectomy defects of L-4-5 and S-1 and a moderate amount of opaque material remains in the spinal canal from previous myelography.

/s/ A. Thaggard
A. THAGGARD M.D.
Roentgenologist

4-25-66 am
Date

EXHIBIT No. 25j

Ralph A. Munslow, M.D.
Richard D. Price, M.D.

CApitol 5-2781

DRS. MUNSLOW & PRICE
NEUROLOGICAL SURGERY
1233 Nix Professional Building
San Antonio, Texas 78205

19 May 1966

Mr. Gordon Cook
Continental Casualty Co.
1119 Majestic Bldg.,
San Antonio, Texas

Dear Mr. Cook:

Re: Pedro Perales, Jr.
Jim Walter Corporation

This final type note on the above patient: According to my records, I last saw him in our office in February of this year, at which time he had multiple complaints, was neurologically negative and it was suggested that he take plain Empirin tablets for relief of any pain that he might have, but return to work. I may have seen him one additional time on a more or less informal occasion, since that time, but have no record of it. I feel that he could return to work. I do not believe that his disability exceeds ten percent.

Very truly yours,

/s/ Ralph A. Munslow
RALPH A. MUNSLOW, M. D.

RAM:fr

[San Antonio, May 21, 1966]

EXHIBIT No. 25i

Ralph A. Munslow, M.D.
Richard D. Price, M.D.

CApitol 5-2781

DRS. MUNSLOW & PRICE
NEUROLOGICAL SURGERY
1233 Nix Professional Building
San Antonio, Texas 78205

9 March 1966

Mr. Gordon Cook
Continental Casualty Company
1119 Majestic Building
San Antonio, Texas

Re: Pedro Perales, Jr.
Jim Walter Corp.

Dear Mr. Cook:

As I believe you know, I have seen this man from time to time in our office attempting this and that medication in an effort to motivate him and get him back to work, but apparently without success. Two weeks ago he told me that he had fully intended to go to work and felt capable of doing it, but he drove to Corpus and on the return trip he said that his car was buffeted by wind to the event that his back began to hurt again.

I have rechecked him neurologically and am unable to put my finger on anything that I can ascertain as the cause of his pain.

While it is my feeling that his symptoms are probably functional, I could be biased in my thinking, and I would like your authorization for an examination by Dr. Morris Lampert, the neurologist. Should he find something which I have overlooked or if he comes to a different conclusion, we certainly should know about it. On the other hand, if he is unable to identify the source of this man's pain, I would feel a good bit more secure in put-

ting the cards on the table with him and withholding further medication.

Anticipating your call, I remain

Sincerely,

/s/ Ralph A. Munslow
RALPH A. MUNSLOW, M. D.

RAM/jb

[San Antonio, Mar. 10, 1966]

EXHIBIT No. 25h

Ralph A. Munslow, M.D.
Richard D. Price, M.D.

CApitol 5-2781

DRS. MUNSLOW & PRICE
NEUROLOGICAL SURGERY
1233 Nix Professional Building
San Antonio, Texas 78205

10 May 1966

Mr. Gordon Cook
Continental Casualty Company
1119 Majestic Building
San Antonio, Texas

Re: Pedro Perales, Jr.
Jim Walter Corporation

Dear Mr. Cook:

In response to your inquiry as to whether the above patient might need home nursing care, may I say that the last time I saw him he appeared to me to be perfectly capable of taking care of himself.

Very truly yours,

/s/ Ralph A. Munslow
RALPH A. MUNSLOW, M. D.

RAM/jb

P.S.: Thank you for sending me a copy of Dr. Morris Lampert's evaluation on Mr. Perales. I agree completely with his conclusions regarding this patient. RAM/jb

[San Antonio, May 11, 1966]

EXHIBIT No. 26

MORRIS H. LAMPERT, M. D.
[Address Illegible]
San Antonio, Texas

Neurological Medicine Electroencephalography

3 May, 1966

Narrative Summary on Mr. Pedro Perales

HISTORY: This 34 years old male was first seen on 6 April, 1966 for neurologic evaluation. The patient denies any discomfort or significant illness prior to 29 September, 1965 at which time he was involved in an accident while working for the Jim Walter Corporation as a driver and warehouseman. Mr. Perales states that he lifted a bundle of roofing, weighing approximately 65-70 pounds, while loading a truck. He experienced the sudden onset of lower back pain which spread superiorly to the neck (?). Because of unremitting back and left leg pain, the patient was admitted to the Nix Memorial Hospital in October, 1965. A conservative program of pelvic traction was uneventful. A laminectomy was performed on 23 November, 1965 by Dr. Ralph A. Munslow; no disk protrusion was found. The impression at that time was that of nerve root compression syndrome on the left with laminectomy at L-5.

In the interim, the patient has experienced the following:

1. Recurrent headaches: The discomfort is described as an aching, tight pain over the posterior cervical, suboccipital and occipital regions, associated with occasional rostral spread. The frequency is daily; the discomfort is constant. Headaches are intensified by prolonged walking (1-2 blocks or more); there is no relationship of the pain to coughing, sneezing. Aspirins afford no relief to the patient.
2. Recurrent lower back pain: The patient complains of constant aching pain in the lower back region and is similar to the pain that was present prior

to surgery. There may be spread of pain into the right lower extremity and is of burning quality over the posterior lateral aspect of the right thigh and buttocks; this area is sensitive to touch. A rather non-descript pain is experienced or appears to be present over both posterior lateral thighs and buttocks. In general, back discomfort is heightened by:

- Prolonged sitting.
- Prolonged walking.
- Prolonged lying in the supine position.
- Bending.
- Coughing and straining.

Some degree of relief may be afforded by frequently changing of the position.

3. Recurrent numbness of the ring and middle fingers on either side. The frequency is daily or every other day. Initially this was a daily frequency.
4. Recurrent swelling of the feet over the past two months.

PHYSICAL EXAMINATION: The patient is a well developed, well nourished, somewhat obese white male who is alert and cooperative. Multiple tatoos are present over the body. Responses to the motor examination are obviously histrionic.

Cranial Nerves: II through XII are intact.

Sensation: Pinprick, touch, vibratory sensation, position are unimpaired save for a vague hypalgesia over the L-4 distribution on either side involving the medial aspect of the legs (knee region) up to the ankle.

Reflexes: The deep tendon reflexes are equal and physiologic. The plantar responses are flexor bilaterally.

Motor System:

1. Muscle status: There is no evidence of atrophy.
2. Power: There is no weakness of any muscle group. However, there is a histrionic paresis that is present, especially with respect to the lower extremities. With testing of wrist and arm entensors, biceps and deltoid muscles, the patient complains of back and interscapular discomfort.

3. Station and gait: The patient sustains weight on either leg. A paretic gait is not present.
4. Coordination: There is no evidence of cerebeller or extrapyramidal signs.

Autonomic System: Negative

Musculo-skeletal System:

1. Neck: The muscles are held quite tightly. Discomfort is evoked, but is vague and non-descript. There is no focal muscle tenderness of spasm present. The cervical compression test seems to evoke unilateral pain on either side relative to the side of the compression. No radicular pattern is seen.
2. Back-vertebral column: There is a scar in the lumbosacral region; this area is tender to palpation, however, no muscle spasm is noted.
3. Hip-shoulder girdle maneuvers: Unremarkable.
4. Straight leg raising test: This seems to be positive at 10-30 degrees and especially at 60 degrees on the left and right. The patient bends at 60 degrees. He squats with minimal difficulty.

IMPRESSION: There is no objective evidence of neurologic involvement. Responses to the examination are strongly histrionic. Conversion symptomatology is present. The vague hypalgesia over the L-4 distribution is difficult to interpret; this response to the sensory examination is difficult to refute or to confirm.

RECOMMENDATIONS:

1. Mellaril, 25 mg t.i.d.
2. Back exercise program that is intensive.
3. If symptoms persist in a significant manner, then myelography should be considered.
4. Psychological evaluation.

MORRIS H. LAMPERT, M. D.

MHL/ej
encl: Mr. Gordon Cook
1119 Majestic Building
cc: Ralph A. Munslow, M. D.
1233 Nix Professional Building

American Medical Association

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Office of Chairman of Section
1310 Willow Bend Blvd., Houston 35, Texas

EMG potentials :-

A normal muscle at rest is electrically negative & would on deflection on base line - diagrammatically illustrated as ———

A muscle (normal) on contraction at will (voluntary) show diphasic potential ⊓⊓⊓⊓⊓ etc - - -

Polyphasic potentials - show repeated deflections on base line ⊓⊓⊓⊓⊓ and are diagnostic or of major importance by themselves - frequently found - particularly in post operative cases etc.

EXHIBIT 27

F. b. r. Motor potentials — ⊓⊓⊓⊓⊓ are indicative of organic involvement of muscle or nerve - & poly phasic potentials & fibrillation potentials together are indicative

Ex # 27

of organic involvement — while polyplastic pubes
by myself are not indicative.

D O

EXHIBIT No. 27a

1 February 1966

Mr. Gordon Cook
Continental Casualty Company
1119 Majestic Building
San Antonio, Texas

Re: Pedro Perales, Jr.
Jim Walter Corporation

Dear Mr. Cook:

I believe you are aware of the fact that we were going to get this man back in for re-evaluation by reason of his persistent complaint and being unable to return to work. He complains of pain not only in his low back, but also neck pain, neck swelling, chest pain, headache, inability to sleep, etc.

From the post-operative neurologic standpoint, however, he continued to improve. I believe I included in my last report on him the fact that after carrying out myelography, we were unable to get all the Pantopaque material out of his spine and felt that sometime in the future this should be done. This was probably the primary reason for getting him in the hospital at this time.

Dr. O'Neill, the radiologist, fluoroscoped and took pictures of his lumbar spine and reported that there had been considerable absorption of the dye and that so little was in the sac that its withdrawal probably would not be worthwhile. No attempt, therefore, was made to go after the remaining material, and these facts were explained to the patient—that is, that it was not necessary.

Pedro had an acute upper respiratory infection on admission, and we treated this while observing him. He felt considerably better on discharge. When he left the hospital he was taking but a minimal amount of ordinary analgesics, and he was advised to continue these if he needed them, but to anticipate returning to work

in the not too distant future. His problem of obesity remained, and I am not sure that he is willing to solve it. I plan to see him in the office in a couple of weeks and will write you at that time.

Very truly yours,

RALPH A. MUNSLOW, M. D.

RAM/jb

Enclosure
cc: Dr. Brad Oxford

[Best Copy Obtainable]

EXHIBIT No. 28

3 January 1966

Mr. Gordon Cook
Continental Casualty Company
1119 Majestic Building
San Antonio, Texas

Re: Pedro Perales, Jr.
Emp: Jim Walter Corporation

Dear Mr. Cook:

A rather brief note on Mr. Perales, whom I have seen in our office on several occasions. He continues to complaint of pain, not only in his back and legs, but throughout his neck, and this is associated with a headache. He claims that this has been present since we had him in the hospital last and believes he is not getting better.

Since he has not done too well on medication, I feel it perhaps might be wisest to put him back in the hospital for several days for a recheck.

Very truly yours,

RALPH A. MUNSLOW, M. D.

RAM/jb

cc: Dr. Brad Oxford
1526 Nix Professional Building
San Antonio, Texas

EXHIBIT No. 29

22 November 1965

Dr. Brad Oxford
1528 Nix Professional Bldg.
San Antonio, Texas

Re: Pedro Perales, Jr.
Jim Walter Corporation

Dear Dr. Oxford:

Pedro Perales was in the office on Friday and he was in, I think, a good bit more pain than he was when he left the hospital. He has apparently conscientiously tried to avoid walking, bending and lifting and has stayed in bed most of the time at home, but has gotten worse, and he is to the point where he can't stand the pain any longer. The sciatic pain is radiating down both lower extremities now, and is worse in the region of his tailbone. He has sensory changes bilaterally, as well as bilateral sciatic tenderness, weakness and reflex changes.

I think almost surely he has extruded a disc, and I wouldn't be at all surprised but that there is a free fragment lying in the middle of the lower part of the canal. Certainly, he should be admitted for myelography and surgery. He would prefer to come again to the Nix.

Very truly yours,

RALPH A. MUNSLOW, M. D.

RAM/jb

cc: Mr. Gordon Cook
Continental Casualty Co.
(Enclosure).

EXHIBIT No. 30

12 November 1965

Mr. Gordon Cook
Continental Casualty Company
1119 Majestic Building
San Antonio, Texas

Re: Pedro Perales, Jr.
Jim Walter Corporation

Dear Mr. Cook:

The above patient was seen and examined in neurosurgical consultation at the Nix Hospital where he was a patient by the undersigned on 26 October 1965. A detailed consultation note was placed on the patient's record. Briefly, it appeared to me, as it did to Dr. Oxford, that this man had a protruded intervertebral disc and that he likely was not going to respond to conservative management. Surgery was suggested, and the patient could not make up his mind whether he did or did not want the procedure carried out, and in the meantime began to get better. In the face of his improvement we felt that it certainly was alright for him to go home to see how he did for a couple of weeks. If his improvement did not continue, the thought was that he ought to go back into the hospital for myelography and probable surgery.

Very truly yours,

RALPH A. MUNELOW, M. D.

RAM/jb

Enclosure
cc: Dr. Brad Oxford
1526 Nix Professional Building
San Antonio, Texas

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Bureau of Hearings and Appeals

HEARING EXAMINER'S DECISION

In the case of	Claim for
Pedro Perales, Jr. (Claimant)	Period of Disability and for Disability Insurance Benefits
Same (Wage Earner)	465-38-6398 (Social Security Account Number)

This case is before the Hearing Examiner upon a request for hearing filed on November 15, 1966, by Pedro Perales, Jr., claimant, who is dissatisfied with the reconsidered determination of the Bureau of Disability Insurance, Social Security Administration, Department of Health, Education, and Welfare, of which he was notified on October 20, 1966. After proper notice, a hearing was conducted before the undersigned on January 12, 1967, at San Antonio, Texas, with the claimant present and participating. Also present and participating was Max Morales, M.D., claimant's personal physician. He was represented at the hearing by Richard Tinsman, Attorney-at-Law.

After review of the evidence, including that adduced at the hearing, the undersigned was of the opinion that a supplemental hearing was necessary to clear up some discrepancies in the record and to take the testimony of a medical adviser and vocational expert. A supplemental hearing was held at San Antonio, Texas, on March 31, 1967, with the claimant and his representative, Mr. Richard Tinsman, present. Mr. Raoul Rico, after being served with a subpoena by the Hearing Examiner, appeared and testified at this hearing; Lewis A. Leavitt, M.D., was present and testified as medical adviser; and J. C. Pool was present and testified as vocational expert witness.

The claimant's appeal is from a determination denying his application filed April 20, 1966, for a period of disability and for disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended, hereinafter referred to as the Act. The denial of the application by the Bureau of Disability Insurance was based on its determination that the claimant had failed to establish that he was suffering from a medically determinable physical or mental impairment or impairments of sufficient severity to prevent him from engaging in any substantial gainful activity within the meaning of the Act.

The claimant alleges in his application that he became unable to work on September 29, 1965. He described his impairment as "back injury."

STATEMENT OF APPLICABLE LAW AND ISSUES

Sections 216(i) and 223(c)(2) of the Social Security Act, as amended, defines the term "disability" to mean inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

The general issues before the Hearing Examiner are whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Act. The specific issues are (1) whether the claimant is under a "disability," as defined in the Act, and if so, when such disability commenced and the duration thereof, and (2) whether the claimant had an insured status at the time he became disabled.

ORIGINAL HEARING

SUMMARY OF NON-MEDICAL EVIDENCE

The earnings certification of the claimant shows that he was insured for disability insurance benefit purposes on

September 29, 1965, the alleged onset date of his disability, and will continue to have an insured status for such benefits through September 30, 1970.

The claimant testified that he is 35 years of age, has a third grade education, is married and has 3 children of ages 13, 12 and 10 and all of whom are in school. The family lives in a small 4 room house which is rented for $45 per month. His wife who had not worked for some 15 years since they were married, went to work about 6 months prior to the date of hearing at a drugstore where her take-home pay is $24 per week.

The claimant formerly worked for the Jim Walters Corporation for 6 years as a truck driver and this work required that he load and unload building materials. This Company sells material for the construction of houses and the purchasers finish the houses with their own resources. In the evenings and on weekends he and his wife used to sell houses. At first he earned about $200 per week selling houses but the Company did not like the idea of his being a truck driver and selling houses, so they gave the job of selling houses to a salesman and he returned to being a truck driver. About 2 or 3 years ago he started selling houses again and was made assistant manager of the San Antonio office at $100 per week until they brought in another man from Corpus Christi and he returned to being a truck driver, although he was permitted to sell houses on the side at $50 per house commission.

The claimant is 5 feet 10 inches tall and weighs about 215 or 220 pounds. He testified that he lays in bed most of the time because he cannot sit in a chair too long. In the morning he goes for a walk of a distance of about 4 blocks. He takes his cane with him and it takes him about 30 minutes because he stops to look at cars in a car lot. He and his wife visit with a neighbor on occasion but she works also. The children go to the grocery store and they usually come home about a quarter of 4 and at which time he is usually in bed.

The claimant injured himself on September 29, 1965, while lifting bundles of shingles weighing approximately 65 pounds each from a warehouse onto his truck. He received medical treatment, as more fully set out hereinbelow, and for a period of 6 months the Company paid him $75 per week in accordance with its plan. In addition, the claimant drew $35 per week for a period of 34 weeks from the insurance company carrying Workmen's Compensation insurance on the employees.

In February, 1966, he had intended to go back and start selling houses again. He purchased automobile liability insurance in order to drive his car. He had already talked to the manager of the Company and the Company had agreed to put him on at $50 per week plus $50 commission on each house that he sold. He then described a trip which he took to Corpus Christi during that month as follows: "So I was going to Corpus to pick up my wife, and I said I don't want to make that long trip, and she said, 'Oh, come on,' she tell me to go ahead. 'You're going to be a salesman and you're going to work outside the city limits, they go and do the canvassing.' So I went on with them and he asked me if I wanted to drive back and I said, 'No, I don't think I should,' and he said, 'Come on.' So I told him, 'Well, why don't you back the car out of the driveway and I'll just take it straight on out and I won't twist my back or nothing.' So he drove the car, took it out of the driveway and I got the car from there and drove from Corpus Christi and I drove on Highway 9, and I felt a strong wind come and jarred my car and it moved my steering wheel and I told the wife, I said, I told my wife I couldn't control the car, I'm hurting, so I pulled over to the side, I said I can't control it, so I told my wife I can't control it, there's something wrong, I'm hurting my back."

The claimant had previously testified that he drove some 65 miles from Corpus Christi to San Antonio in February, 1966, and when asked if his wife was with him he had stated, "No, I was with Jim Walters Corporation, I was going back to work as salesman."

The claimant made no further attempt to sell houses because, as he stated, he found out that he could not control the car and there was no need to get out on the highway and get killed or kill bomebody else. He has his own 1955 Oldsmobile with automatic transmission, power brakes, but no power steering which he still drives occasionally for short distances around town.

He noticed the day after he returned from Corpus Christi that he was "getting a swelling" and "my feet, my hands, my arms got numb, my fingers got numb * * *." He went to see his doctor but the latter told him that he did not know what was causing all of that.

He testified that he generally falls asleep about 3:30 in the morning and sleeps fitfully until about 6:30 when he awakens. He is able to dress himself except that his children help him put on his socks and shoes. He does not have any breakfast except for a cup of coffee which his wife makes for him before she goes to work at about 7:30. After she leaves he gets up and sits around for a short while and then goes back to bed and sleeps for about 30 minutes to an hour. He sleeps 3 or 4 hours during the day. He does not eat lunch and has to wait until his wife returns about 7:00 p.m. for supper. Supper usually consists of a cheese sandwich and sometimes beans or eggs, or "something like that."

When asked to explain his 210 pounds on the amount of food which he described, he replied that this was all he had to eat, that in the morning when he awakened he could see his belt but after a cup of coffee his stomach felt big. It also felt big after supper and he took an ant-acid which his doctor had prescribed and sometimes took an Alka-Seltzer.

He does nothing by way of helping with the work at home and he usually goes to bed about 11:00 p.m., but does not go to sleep until about 3:00 in the morning because he feels stiff from the neck down and pain from the middle of his back to the end of his tail bone. He also feels a depression, as he described it, around his neck in the back just between his shoulders. It feels like

a heavy pressure. He also has headaches. As he moved in his chair he explained that the pain went down from his right hip to the right knee cap and that he also feels this pain at times from his left hip down to his left leg. He did not have cramps that swell up the muscles in his legs. He tried to lie on his stomach sometimes but the middle of his back hurt him more.

SUMMARY OF MEDICAL TESTIMONY

The claimant's personal physician, a graduate of the University of Texas Medical School in Galveston with an internship at Robert B. Green Hospital, and 5 years of practice as a family physician and general practitioner, testified he first saw the claimant on April 13, 1966. The claimant told him he had hurt his back while lifting a heavy load of approximately 250 pounds, he had a severe pain in the spine and went to see a doctor who had diagnosed a slipped disc and a pinched nerve and the first doctor had referred him to a second doctor and following which the first doctor then operated on him. Following the operation and after some treatment by his first physician the claimant came to him. He treated him for complaints of numbness and swelling of his lower extremities and a severe back pain.

He testified that the pre-operative diagnosis had been a probable protruded intervertebral disc, a hemilaminectomy had been performed and the post-operative diagnosis had been a nerve root compression syndrome on the left side. Undoubtedly, after the surgeon had gone in he found that the claimant had a nerve root compression rather than a protruded intervertebral disc and he removed what, in his opinion, was sufficient tissue, bone or cartilage to eliminate the compression in this region.

The claimant's personal physician explained that when patients go to another doctor with complaints which a prior doctor has treated, it is necessary to proceed very carefully, learning all one can about the history and the treatment. In this case, he treated the claimant with deep heat and muscle stimulation. He was not able to

learn very much which would help from talking to the doctor who performed the operation and from the x-rays but the claimant continued returning, some 30 times or so, with the same complaints—low back pain, inability to stand or sit very long at one time, swelling of the feet, pains in the low back which radiated to numbness in the left buttocks, and pain down the left extremity. He has led the claimant in conversation to see if he could trip him and to test his truthfulness but at no time has he been able to trip him.

He further explained that there are times when a physician can not find objective evidence of injury and must rely on judgment which he has developed through the years. As an example of this, he explained that after his own wife had fractured her hip, three of the leading orthopedics in the State of Texas had not been able to detect the break and finally he solved the difficulty through motion studies with x-rays which he himself had made.

He recognized that 2 myelograms and an electromyogram had been made of the claimant in addition to the operation in which the surgeon went into the suspected area in the back and, although clinically, they did not reveal objective evidence of an impairment and while the surgeon had undoubtedly done what he thought should be done, he considers that there is still pathology present in the region. He recognized that his conclusion was based on the symptomotology and on what he felt about the patient.

He considered that further surgery might prove beneficial but explained that the original surgeon who made the operation would be reluctant to go in again since he had done what he thought was necessary and other orthopedic surgeons in the area would be reluctant to do anything unless it was absolutely necessary. When asked what type of surgery he would recommend, he answered that this would be for the surgeon to determine.

When the Hearing Examiner remarked that motion, myelograph, x-ray and electromyographic studies all indi-

cated negative findings, the witness stated that this was not clear and that there were positive findings. He pointed out from the electromyograph studies that polyphasic units had been seen in the distribution of the L-4 and L-5 roots which suggested an old or chronic disturbance. He interpreted this to mean that although there was no new disturbance there was a disturbance which had been there for a long time. In addition, the fact that surgery had been performed and the x-ray report showed a moderate amount of opaque material remaining in the spinal cord from a prior myelogram was also evidence of a disturbance.

He disagreed with the impression of one doctor that the claimant had a psychiatric overlay to his illness and that the claimant should be seen by a psychiatrist. When asked why, he replied that one has to know the man, meaning the claimant.

A psychiatric examination had been made in this case prior to hearing and the conclusion is stated in the report of the examination that the claimant has a paranoid personality, manifested by hostility, feelings of persecution and long history of strained interpersonal relationships. The psychiatrist concluded with the following: "I do not feel that his (sic) patient has a separate psychiatric illness at this time. It appears that his personality is condusive (sic) to anger, frustration, etc."

SUPPLEMENTAL HEARING

SUMMARY OF NON-MEDICAL TESTIMONY

In view of some of the inconsistencies in the statement made by the claimant as to what transpired on the occasion when he went to Corpus Christi and returned, the Branch Manager of the Jim Walters Corporation was subpoenaed. He testified that he had been branch manager for 3 years, that he first met the claimant in 1965 and recalled taking a trip with him to Corpus Christi in February, 1966. The wife of the branch manager also went. It was his best recollection that the claimant drove

all of the way down to Corpus Christi and he, the branch manager, drove back.

The claimant was supposed to stay with the branch manager all day after they returned to San Antonio but the claimant complained of his back hurting and asked to be taken home because he could not walk too much and was tired. He did not complain on the way down to Corpus Christi but did complain after they arrived that his back hurt, he couldn't straighten up and his neck was "kinda" sore.

The Company had intended to give the claimant an easier job as a salesman selling out-of-the office where he would not have to move around too much. It was intended that he would wait on customers and would not have to do any travelling but the claimant was sick and said he could not go back to work as yet. The claimant was to receive $50 per week and draw commissions on whatever he sold. The claimant lives some 5 or 6 miles from the place of business.

On cross-examination he did not recollect the claimant driving part of the way back, stopping, and saying that he could not drive farther. It could have been that the claimant drove back and he drove down, meaning the branch manager, but in any event his recollection was that one person drove down and the other drove back. He recalled that when they got out of the car on the return trip the claimant could hardly walk and had a swelling of the neck. Although the claimant would be required to show the customers the model houses on a lot he was sure that the work offered the claimant would not require that he go look at the lots where the houses would be constructed. There were 3 model houses some 10 feet apart and 10 feet from the office. Each of the houses has 3 steps about 8 inches high each. The claimant was to receive $50 salary per week and $150 commission on each house that he sold.

He and the claimant stopped at the home of the branch manager's mother when they arrived in Corpus Christi and the claimant complained that his back was hurting. It appears that his complaint was elicited as the result

of an inquiry which was made when he walked in with a cane. The claimant got in and out of the car slowly and the witness almost had to help him get out of the car.

The claimant took the stand in rebuttal and testified that, as he recalled it, the branch manager drove down to Corpus Christi where they picked up the branch manager's wife and her mother. On the return trip he told the branch manager that if the latter would back the car out of the driveway he would drive back. He stated further that he could not back up the car because he could not turn around and that about 65 miles out of Corpus Christi he told the wife of the branch manager to awaken him because he could not control the car, and the branch manager then drove the remainder of the way to San Antonio.

His version of the offer of employment was that they offered him $50 per week to canvass and knock on doors which required that he drive his car. This offer had been made before he bought the insurance for his car. On the day following their return from Corpus Christi he telephoned and told them that he would not be able to work and they told him that it was okay but if he wanted to work they would pay him $35 per week. He added that he had not been able to go back earning $800 per month, the lowest that any of their salesmen earned, "because going and walking I get all swollen up and in fact sitting down I get swollen."

The Hearing Examiner was perplexed by the fact that although in prior testimony and in a letter addressed by the claimant to the State Industrial Accident Board, the claimant had mentioned his dire financial status, the claimant still had a telephone in his home. Asked to explain this situation, he testified that he owes about 3 months on a telephone bill and he wanted to disconnect it but his wife said no and that it was necessary to have a telephone at home because the children come home from school at 3 o'clock and if they have problems or he is asleep or something happens to him they can get in touch with her. They have no friends and no one at home, so they have to have a telephone.

TESTIMONY OF MEDICAL ADVISER

The medical adviser, who is Chairman of the Department of Physical Medicine and Professor of Physical Medicine and Rehabilitation at Baylor University College of Medicine in Houston, Texas, testified that based on the medical records in evidence, the testimony of the claimant's personal physician, copy of which had been furnished him, and the testimony of the claimant, which he had heard, it was his opinion that the claimant initially had a low back pain secondary to the lifting of approximately 70 pounds and which was manifested by some muscle spasm of the low back. The x-rays were non-contributory and indications were that an initial myelogram was performed which was negative. A hemilaminectomy was performed and the claimant's surgeon could not find a herniated nucleus pulposus. "The only thing he could find at surgery in the hemilaminectomy was some tightness of the dura sac which might have been giving some mild pressure to the nerve root as it came from the spinal cord out of the cauda and down into the lower extremity." The claimant was discharged with a diagnosis of neuritis, lumbar, mild, which he termed as being a very vague and general type of non-specific diagnosis.

The claimant then went to another physician, a general practitioner, whose only objective information regarding the ailment was spasm of the low back with secondary limitation of flexion of forward bending of the back. He has treated the claimant rather lengthily with analgesics, some low grade narcotics, codeine, and spasmolytic medications.

He further testified that another physican had performed an electromyographic examination and found it negative. He explained that such an examination is 80% to 85% accurate and that myelogram studies are 70% to 80% accurate. The electromyographic examination did find some polyphasic motor potentials which one would expect to find after surgery. The witness made 2 sketches, one illustrating a fibrillation potential and the other a poly-

phasic potential, and explained that together they are significant and that fibrillation potentials by themselves are significant and polyphasic by themselves are not significant or diagnostic.

He also pointed out that the electromyographic examination diagnosed that the claimant was willfully not trying to bring up the foot or the knee in a good and forceful manner and that this verified findings of another physician that the straight leg raising test was somewhat but not too abnormal, or as he explained later that it was "relatively normal, not completely but relatively." He also noted that another neurosurgeon, while the patient was in the hospital, had thought that the difficulty was mainly musculo-ligamentous, again the low back syndrome, and that he had recommended a placebo, which is medication that has no effect on the patient and progressive activity.

It was the opinion of the medical adviser that an initial involvement contributed to the low back syndrome, an acceptable term in keeping with the reports of the various physicians, the severity of this impairment was mild and that based on the reports of the various physicians the claimant needed physical activity under progressive therapeutic supervision.

When asked what limitations of motion he would impose on an individual with a low back syndrome, mild, he answered that it was difficult to state when he had not examined the patient. While it would vary with the patient he would say that in general such a person should be able within a relatively short period of time, meaning a month or so, to resume activity commensurate with an 8-hour day that would not have heavy lifting or stress to the back which might examerbate the previous condition. In general one might say that such a person was 10% disabled.

TESTIMONY OF VOCATIONAL EXPERT

A vocational expert, who is an Assistant Professor and Dean of Student Life at Trinity University and under

whose supervision and in whose office there is a Counseling Center which furnishes counseling for 100 disabled veterans from the Veterans Administration each month, was asked to give his advice concerning the possible employment in and around the San Antonio area of persons suffering from medical impairment and with a background similar to that of the claimant. In addition to his qualifications as evidenced by his present assignment at Trinity University, he stated that he had also served as a vocational rehabilitation counselor with the State of Texas directly supervising the testing, counseling and placement of handicapped persons over a period of 7 years.

He pointed out that in his work he utilizes the dictionary of Occupational Titles which gives the physical demands, working conditions and training time of some 44,000 jobs which he combines with his knowledge of the community, the jobs available in the community and the demands of those jobs. On occasion this entails going out and talking to an employer and a considerable amount of contact by telephone. On occasion it also becomes necessary to consult with a doctor.

He stated that he had examined the exhibits, the transcript of the original hearing, and heard the evidence of the supplemental hearing. Taking into account the various factors such as the claimant's age, schooling, work history and assuming that he had an impairment of a low back syndrome, mild, of musculo-ligamentous in origin but which also has an emotional involvement, a limitation of not lifting more than 25 pounds or engaging in work which places stress on his back, the vocational expert was asked to state whether or not there were any jobs in the San Antonio community which such a person could perform.

It was his opinion that the claimant had "missed his best bet" when he left the job of selling houses at the Jim Walters Corporation. He had noted an advertisement in the previous day's newspaper which called for a ticket taker at a concession at Playland Park, some 10

or 12 blocks from the claimant's home. He felt that the claimant could also work as a security guard for a number of companies who employ men to provide watchmen and security service. They do not carry guns, the work does not involve physical violence, and most of these places are locked. There are jobs of a janitorial nature which do not require heavy lifting and the heaviest thing to be lifted is a waste basket. There are also service station jobs which do not require any grease or oil work and all that is required is pumping gasoline.

When Counsel for the Claimant suggested that the claimant could not perform the guard work because he had to walk slowly and with the use of a cane, the vocational expert stated he had not noted this in the record. The Hearing Examiner advised the vocational expert that he had noted the claimant walking with a cane, both slowly as well as what appeared to the Hearing Examiner to be a normal rate. At this point the medical adviser stated that "we have placed through D.T.I. many people who, many people in Houston who have, what is called a stroke patient. They may walk with a cane but they employ them as guard duty."

Asked what such individuals could do if they needed help very quickly, the vocational expert explained that these individuals carry walkie-talkies and can get help in a matter of 2 minutes.

The claimant explained that his son had gone to Playland "to ride out there" and had telephoned home and told his mother that they had offered him a job for that night taking tickets and putting children in the containers and taking them out. When asked if the claimant could do that the vocational expert replied in the negative but also explained that there are different kinds of ticket takers there.

ANALYSIS OF EVIDENCE

While this Hearing Examiner was initially of the view that this case would present the old problem of subjective versus objective medical evidence of impairment, it turns

out that this is not the question in this case. There is objective medical evidence of impairment which the heavy preponderance of the evidence indicates to be of mild severity.

While the subjective recitation of the complaint of the claimant would indicate that the low back syndrome, with its overlay of emotional involvement, is much more severe, there is the problem of the weight to be given this evidence. In this connection, the Hearing Examiner is convinced that some of the inconsistencies in details of claimant's testimony are the result of his lack of understanding and inability to more fluently speak in English. On the other hand, there are inconsistencies, not the result of a lack of communication, which have not been explained in a satisfactory manner.

There have been two separate myelograms, an operation in which the surgeon was able to visually examine the pathological condition, and a subsequent electromyographic examination. Some of these have indicated no impairment and others only a mild involvement. The willful resistence to motion of limb by the claimant on occasion, as indicated in the electromyographic examination, and supported by a prior neurological examination on the part of one of the doctors who examined him, is in itself significant.

Taken altogether, the Hearing Examiner is of the conclusion that the claimant has not met the burden of proof.

FINDINGS OF FACT

The Hearing Examiner has carefully considered the entire record in this case, and based on the preponderance of the credible evidence, makes the following specific findings:

1. The earnings certification of the claimant in this case establishes that he has an insured status for disability insurance benefit purposes which will continue in effect through September 30, 1970.

2. The claimant is suffering from a low back syndrome of musculo-ligamentous origin, and of mild severity.
3. While the claimant has an emotional overlay to his medical impairment it does not require psychiatric treatment and is of minimal contribution, if any, to his medical impairment or to his general ability to engage in substantial gainful activity.
4. Neither his medical impairment nor his emotional overlay, singly or in combination, constitute a disability as defined by Sections 216(i) and 223(c) of the Social Security Act, as amended.
5. The claimant is capable of engaging as a salesman of predesigned and fabricated materials for the construction of individual homes and in which work he has been previously engaged. In addition, he is capable of engaging in work as a watchman and security guard in establishments which do not require strenuous physical activity, and similarly as a ticket taker and janitor. The listing of these occupations is not intended to be all inclusive.

DECISION

Accordingly, it is the decision of the Hearing Examiner that, based on his application filed November 15, 1966, the claimant is not entitled to a period of disability or disability insurance benefits under the provisions of Sections 216(i) and 223(c), respectively, of the Social Security Act, as amended.

/s/ Frank J. Buldain
FRANK J. BULDAIN
Hearing Examiner

Date: May 12, 1967

Law Offices of
TINSMAN & CUNNINGHAM

Richard Tinsman
James D. Cunningham
Michael B. Hunter

1907 National Bank of
Commerce Building
San Antonio, Texas 78205
Area Code 512 CApitol 5-3125

May 24, 1967

Mr. Frank J. Buldain
Hearing Examiner
Bureau of Hearings and Appeals, SSA
Department of Health, Education and Welfare
P. O. Box 61529
Houston, Texas 77061

Re: Pedro Perales
618 Avenue A
San Antonio, Texas 78207

Dear Mr. Buldain:

In preparing for the compensation case, we learned that Dr. Coyle Williams, who is an associate of Dr. Langston's in the same office, saw Mr. Perales on December 14, 1966, and it is his opinion that Mr. Perales, as shown by the enclosed report, has a post operative hernaited disc. In view of this, we would like for you to reconsider the findings that you made; in any event, due to the limited time for making an appeal, please advise us promptly of what you are going to do.

Very truly yours,

TINSMAN & CUNNINGHAM

/s/ Richard Tinsman
RICHARD TINSMAN

RT/db
Encl.

cc: Mr. Pedro Perales

EXHIBIT AC-1

December 28, 1966

Dr. J. T. Phillips, Medical Director
State Department of Public Welfare
John H. Reagan Building
Austin, Texas 78701

RE: Pedro Perales, AFDC Applicant
618 Avenue A, San Antonio, Texas

Dear Sir:

I saw this man on 12/14/66 with a history of having injured himself on September 29, 1965 while lifting a bundle of roofing. He had pain in the lower back, and he states he was subsequently paralyzed in the lower extremities for at least 5 or 10 minutes. He was in a stooped position. He saw Dr. Gorsuch and then Dr. Oxford, who apparently were the physicians for the Jim Walker Corporation. The pain was so bad in his back he had to lay on the floor.

He was x-rayed and then hospitalized for traction. The pain began to go from his back down into his legs. He was seen by Dr. Munslow in October and he was told he needed surgery; however, he requested time to think it over, went home and came back in November of 1965 and had disc surgery, and he states he had no feeling of improvement after the surgery. He states he now has pain in both legs and pain in his back. He tends to lose his balance, and he also feels numb in both legs. He states his operative site gets swollen at times, and he states he has to walk with a cane. He is able to walk approximately 7 to 8 blocks, and is able to stand only for about 20 to 30 minutes.

PHYSICAL EXAMINATION: Shows tenderness around the L-4, 5, S-1 area. Straight leg raising is limited bilaterally to 80 degrees. He walks in a slightly stooped position using a cane.

Neurological examination of both lower extremities including reflex examination, sensory examination were essentially negative. The rest of the physical examination was essentially negative.

X-RAYS: This man was re-x-rayed and x-rays of the lumbar spine revealed an essentially normal spine except for the residual radiopaque media apparently from his previous myelogram.

FINAL DIAGNOSIS: Post operative herniated disc.

RECOMMENDATIONS FOR TREATMENT AND PROGNOSIS: Enclosed is a copy of his EMG which is basically the same impression I got from examining this patient. I cannot explain all his symptoms on a physical basis. I would recommend he would re-condition himself and return to work. My estimation, he has a 15% permanent partial disability the body as a whole.

Sincerely,

COYLE W. WILLIAMS, M.D.

CWW/dg
Enclosures

Law Offices of
TINSMAN & CUNNINGHAM

Richard Tinsman
James D. Cunningham
Michael B. Hunter

1907 National Bank of
Commerce Building
San Antonio, Texas 78205
Area Code 512 CApitol 5-3125

June 16, 1967

Appeals Council
Social Security Administration
Department of Health, Education & Welfare
c/o Mr. Frank J. Buldain
P. O. Box 61529
Houston, Texas

Re: Pedro Perales, Jr.
A/N: 465-38-6398

Gentlemen:

Please accept this letter as the request for review by the Appeals Council of the decision by the Hearing Examiner, Frank J. Buldain, made May 12, 1967, wherein he held:

> "Accordingly, it is the decision of the Hearing Examiner that, based on his application filed November 15, 1966, the claimant is not entitled to a period of disability or disability insurance benefits under the provisions of Sections 216(i) and 223(c), respectively, of the Social Security Act, as amended."

Pedro Perales disagrees with the decision of the Hearing Examiner, except the finding of Fact No. 1, which he does agree.

We wish to submit the following supplemental evidence. That on May 26, 1967, in Cause No. F-182,668, in the 131st Judicial District Court of Bexar County, Texas, the Plaintiff, Pedro Perales, Jr., was found to be totally and permanently disabled in a jury trial. The Judgment

was signed on the 2nd day of June, 1967, a copy of which is herewith enclosed for your examination, has not been appealed and was paid by the insurance company.

Also enclosed you will find a photocopy of page 65 of the Transcript of the Hearing held on January 12, 1967. Please note that there are certain changes which we would appreciate you making in said Transcript to correctly reflect Mr. Perales' testimony.

Very truly yours,

TINSMAN & CUNNINGHAM

/s/ Richard Tinsman
RICHARD TINSMAN

RT:mre
Encls.

EXHIBIT AC-2

IN THE DISTRICT COURT
131ST JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

No. F-182,668

PEDRO PERALES, JR.

vs.

CONTINENTAL CASUALTY COMPANY

JUDGMENT

On the 24th day of May, 1967, came on to be heard the above styled and numbered cause, and came the plaintiff in person and by his attorney, Richard Tinsman, and came the defendant by and through its duly authorized attorney, Hugh P. Shovlin, and all parties announced ready for trial, and it was stipulated between the parties that in the event plaintiff may any recovery, plaintiff was entitled to receive same in a lump sum; it was further stipulated that the average daily wage for the plaintiff for the year immediately preceding his injury was $15.00 per day; thereafter a jury of twelve good and lawful persons consisting of Ralph Wheeler, as foreman, and eleven other jurors, all being duly empaneled and sworn, heard the evidence, arguments of counsel and the Court's Charge and thereupon returned in open court their verdict duly signed by said foreman to certain special issues submitted to said jury, which special issues and the answers to such special issues are as follows:

Special Issue No. 1	Yes
Special Issue No. 2	Yes
Special Issue No. 3	Yes
Special Issue No. 4	September 29, 1965
Special Issue No. 5	Permanent
Special Issue No. 6	Not answered
Special Issue No. 7, 8, 9, 10 & 11	Not answered
Special Issue No. 12	$1,852.20

The Court accepted said answers by the jury and ordered the same filed.

It appearing to the Court from the record and from the stipulations of the parties that plaintiff's average weekly wage for the purpose of calculating the compensation rate in this case is a sum entitling plaintiff to the compensation rate of $35.00 per week and that defendant has already paid to the plaintiff 34 weeks of compensation for a total sum of $1,190.00, the Court, after considering the pleadings, evidence, and jury verdict, is of the opinion that judgment should be rendered for the plaintiff, Pedro Perales, Jr., against the defendant, Continental Casualty Company, for total incapacity, which total incapacity will be permanent together with the amount of medical expenses found by the jury to be reasonable and necessary in the sum of $1,852.20.

It is therefore ORDERED, ADJUDGED AND DECREED that plaintiff, Pedro Perales, Jr., do have and recover of and from defendant, Continental Casualty Company, 52 weeks of compensation, accrued to May 26, 1967, in the sum of $1,820.00 together with interest there-on on said 52 weeks unpaid and accrued compensation in the sum of $36.40, all in the sum of $1,856.40 accrued and unpaid as of May 26, 1967, and plaintiff do have and recover of and from defendant, Continental Casualty Company, the further sum of $35.00 a week for 315 weeks in the future, which discounted under the provisions of the Workmens Compensation Act to reduce the sum to a lump sum amounts to 280.2698 weeks, making a sum of $9,809.44 for compensation in the future, for a total amount of compensation due to plaintiff in the sum of ELEVEN THOUSAND SIX HUNDRED SIXTY FIVE AND 84/100 DOLLARS ($11,665.84).

It is further ORDERED, ADJUDGED AND DECREED that defendant shall pay direct to the doctors, hospitals, druggists and appliance suppliers the following amounts:

Santa Rosa Hospital	$800.25
Max Morales, Jr., M. D.	$682.00
Blanco Pharmacy	$298.95
Medical Supply	$ 25.45
Lewis Helfer, M. D.	$ 15.00
Richard Tinsman (for Exer-Genie)	$ 30.55
(Exercise Kit)	

It is further ORDERED, ADJUDGED AND DECREED that out of such recovery by plaintiff of and from defendant in the amount of $11,665.84 that FERRO & LEON and TINSMAN & CUNNINGHAM, attorneys for plaintiff, recover the sum of Three Thousand Four Hundred Ninety Nine and 75/100 ($3,499.75), which is 30% of the amount recovered by plaintiff, as their attorneys fee for representing plaintiff in this cause, the Court hereby finding in this connection that this amount of attorneys fee is reasonable for the services performed by said attorneys. There is no attorneys fee awarded to the attorneys for the recovery of the medical expenses set out above.

It is further ORDERED, ADJUDGED AND DECREED that all costs incurred herein are taxed against the defendant, Continental Casualty Company, and that this judgment shall bear interest at the rate of four percent (4%) per annum from May 26, 1967, the date of the verdict of the jury, & that execution may issue for all of the above sums awarded.

SIGNED this 2nd day of June, 1967.

EUGENE C. WILLIAMS
Judge Presiding

APPROVED AS TO FORM:

BECKMANN, STANARD, WOOD & VANCE

By _____
HUGH P. SHOVLIN
Attorneys for Defendant
FERRO & LEON and
TINSMAN & CUNNINGHAM

By _____
RICHARD TINSMAN
Attorneys for Plaintiff

salary plus $50 commission on each house. So I was going to Corpus to pick up his wife, and I said I don't want to make that long trip, and she said, oh, come on, she tell me to go ahead. You're going to be a salesman and you're going to work outside the city limits, they go and do the canvasing. So I went on with them and he asked me if I wanted to drive back and I said, no, I don't think I should, and he said, come on. So I told him, well, why don't you back the car out of the driveway and I'll just take it straight on out and I won't twist my back or nothing. So he drove the car, took it out of the driveway and I got the car from there and drove from Corpus Christi and I drove on Highway 9, and I felt a strong wind come and jarred my car and it moved my steering wheel and I told the wife, I said, I told his wife I couldn't control the car, I'm hurting, so I pulled over to the side, I said I can't control it, so I told his wife I can't control it, there's something wrong, I'm hurting my back.

Attorney: After that incident, did you attempt to do any more selling?

A. They wanted to give me a job of selling, that's why I wanted to go back to work as salesman. I had done pretty good before I got hurt at selling, I had my area already built up, I knew I could go back and build it up again, but I found out that I couldn't control the car. No need for me to get out on the highway and get killed or kill somebody else.

Q. Did all sales for Jim Walters involve driving to people out in the country and calling on them?

AFFIDAVIT OF IRENE B. GREENE

COUNTY OF HARRIS
SS
STATE OF TEXAS

I, Irene B. Greene, being first duly sworn on oath, depose and say as follows:

1. My name is Irene B. Greene. I am a Hearing Assistant with the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare.

2. I am the Hearing Assistant who recorded the hearing held on January 12, 1967, in Room 215 of the U. S. Post Office and Court House Building, located at 615 E. Houston Street, San Antonio, Texas, before Hearing Examiner Frank J. Buldain, in the appeal of Pedro Perales, Jr., claimant and wage earner, from a determination denying his claim for disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. Mr. Perales was present and participated in the hearing and he was represented by Richard Tinsman, Attorney at Law.

3. A letter dated June 16, 1967, from Attorney Tinsman requests that page 65 of the transcript be changed to correctly reflect Mr. Perales' testimony. Although Mr. Perales speaks with an accent and was difficult to understand, when I was not sure of what he was saying I asked him to repeat for the record. A transcript of the record was made and certified to by me as being a true and complete record of the hearing. The transcript correctly reflects Mr. Perales' testimony as I understood it at the time.

/s/ Irene B. Greene
IRENE B. GREENE
Hearing Assistant

Date: June 20, 1967

Subscribed and sworn to before me, Marie J. Guercio, a Notary Public, in and for County of Harris, State of Texas, on this 20th day of June, 1967.

/s/ Marie J. Guercio
MARIE J. GUERCIO

[SEAL]

My commission expires on the first day of June, 1969.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Bureau of Hearings and Appeals

ORDER OF APPEALS COUNCIL

In the case of	Claim for
Pedro Perales, Jr. (Claimant)	Period of Disability and Disability Insurance Benefits
Pedro Perales, Jr. (Wage Earner)	465-38-6398 (Social Security Account Number)

Evidence in addition to that which was before the hearing examiner has been received by the Appeals Council and is hereby made a part of the record. That evidence consists of a copy of a medical report dated December 28, 1966 from Coyle W. Williams, M.D., marked Exhibit AC-1; and judgment number F-182,668 from the 131st Judicial District Bexar County, Texas, marked Exhibit AC-2.

APPEALS COUNCIL

/s/ Carl Monk
CARL MONK, Member

Date:

[DHEW Emblem]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

Bureau of
Hearings and Appeals

Refer to:
HA:C
Account No.
465-38-6398

July 20, 1967

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Pedro Perales
618 Avenue A
San Antonio, Texas 78207

Dear Mr. Perales:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed. Evidence in addition to that which was before the hearing examiner has been received by the Appeals Council.

The Appeals Council has decided that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would benefit you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this

date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

JOHN T. ALLEN
Member, Appeals Council

LUCILLE V. COVEY
Member, Appeals Council

cc: Mr. Richard Tinsman
Attorney at Law
Santonio, Texas

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 388788 762